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Royal Commission on the Donald Marshall, Jr., Prosecution

Consultative Conference on Discrimination Against Natives and Blacks in the Criminal Justice System and the Role of the Attorney General

Edited Transcript of Proceedings

November 24-26, 1988

The comments contained herein represent the views of the speakers and not necessarily those of the Commissioners.

The Findings and Recommendations of the Commissioners are found in Volume 1 of the Report.

THE ROYAL COMMISSION ON THE DONALD MARSHALL, JR., PROSECUTION

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Preface

This Consultative Conference, sponsored by the Royal Commission on the Donald Marshall, Jr., Prosecution, brought together invited local and national experts on discrimination against Natives and Blacks in the criminal justice system, and the role of the Attorney General. The purpose of the sessions was to allow the invited participants to give the Commissioners their views on identification of the major problems in these areas, as well as recommendations for change.

This document is an edited transcript of those proceedings rather than a word for word record of the events. We hope that it will prove to be a useful resource for future discussion of these important issues.

Letter of Invitation to Participants from Chief Justice Hickman

September 26, 1988

I write to invite you to a Consultation to be held in Halifax on Thursday, November 24th to Saturday, November 26th. The purpose of this gathering will be to bring together experts on the broad, general topics of the impact of racism against Natives and Blacks in the criminal justice system, and the proper role for the Attorney General in prosecutorial decision-making. This meeting will be attended by invitation of the Commissioners. It is not an open conference, although media will be permitted to attend certain portions. The invited experts and community leaders will be challenged to propose and discuss options for improvement and change. Such a Consultation will provide a forum for high-level discussion which we hope will further assist the Commissioners in making innovative, yet practical, recommendations.

The major purpose of this Consultation is to give the Commissioners access to a very broad range of expert advice which they can bring to the process of framing recommendations to deal with the difficult issues that have been uncovered in this Inquiry. This will be a unique and important exercise in public policy-making, and will ensure that the recommendations which the Commissioners make to Government are based on sound, current, and complete knowledge of the issues.

For your information, I will briefly describe the work of the Royal Commission to date.

The Royal Commission on the Donald Marshall, Jr., Prosecution was established to inquire into the conviction of a Micmac youth in 1971 for a murder he did not commit. This task has necessarily required a detailed examination of the actual circumstances of the murder of Sandford Seale, and the factors leading to Donald Marshall, Jr.'s conviction and subsequent acquittal. The Commission's investigation of these matters will determine what went wrong. However, this is only the beginning. The terms of reference of the Royal Commission require us to make recommendations for change to the system which allowed this situation to occur. In order to make meaningful recommendations for change, the Commission must review the contributing factors to the Marshall case against the current state of the administration of criminal justice in Nova Scotia.

The opportunity for an in-depth examination of this system which is so much taken for granted is unprecedented in Canada. Because of the similarities between the provinces in their prosecutorial and

criminal justice systems, it is likely that the work undertaken within the Commission's terms of reference may provide the impetus for change in other provinces of Canada, as well as in Nova Scotia.

To date, the Commission has held broad-ranging Public Hearings (89 days, 113 witnesses) which have served not only to define the factual questions, but have also directly raised more general policy matters. These have included the proper functioning of the courts, the obligations of defence and Crown counsel, the appropriate role of the Attorney General in prosecutorial decision-making, questions of police training and practices, and difficult issues concerning racism against Native and Black people in the criminal justice system. Allegations that have been brought forward in the Hearings have raised concerns about the public's confidence in the integrity and fairness of our justice system. The aim of the Commission is to see if these concerns are well-founded and, if so, to try to deal with them in a constructive manner.

The Public Hearings are only part of the process of investigation. To assist in arriving at recommendations and to give a broader base of information than can be obtained in structured Hearings, five major research projects have been undertaken. An important part of the research process has been consultation with other experts in the areas of work being studied, and with community leaders who have day-to-day experience in the issues under discussion. The peer and community review process will help ensure that the research is sound, and will permit the Commissioners to feel confident in making recommendations based on information found in the research reports.

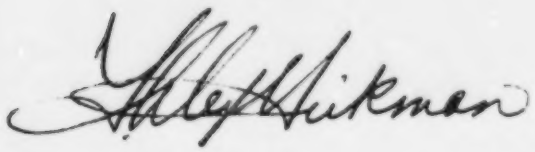
On the basis of the extensive Public Hearings and the ambitious research program, the Commission now has sufficient information to define many of the problems facing the Nova Scotia criminal justice system. The challenge now is to identify appropriate and meaningful solutions.

A detailed agenda for the Consultation will be circulated in the very near future. We are pleased that Thomas R. Berger, former Justice of the Supreme Court of British Columbia and former Chair of several commissions of inquiry dealing with Native issues has agreed to chair our meetings. We are hopeful that these sessions will be stimulating and informative for the participants, and will also provide the Commissioners with meaningful input into the broader policy-related recommendations required by their mandate.

Would you please indicate to us by Friday, October 7th whether you will be able to attend the Consultation. The Commission will pay reasonable travel and living expenses, if necessary, while you are in Halifax. No professional or other fees will be paid. Attached is a sheet that can be completed and returned to the Commission by October 7th. Please feel free to contact Susan Ashley, Commission Executive Secretary, at (902) 424-4800 on any matter relating to these meetings.

I hope very much that you will be able to attend.

Yours truly,



Chairman

Agenda

Royal Commission on the Donald Marshall, Jr., Prosecution
Halifax Sheraton
November 24 - 26, 1988

Thursday, November 24

Improving the Treatment of Natives in the Criminal Justice System

8:30 a.m.
Registration

9:15 a.m.
Opening comments from Chief Justice Hickman
Introduction of the Chair

9:30 a.m.
Opening comments from the Chair, Thomas R. Berger

10:00 a.m.
"Setting the Stage for Change"
Prof. Michael Jackson, Faculty of Law, University of British Columbia

10:30 a.m.
Break

10:45 a.m
Panel Discussion, explaining and evaluating specific proposals for change
(i) Chester Cunningham, Executive Director, Native Counselling Association of Alberta
(ii) Prof. Sam Stevens, Director, Native Law Program, Faculty of Law, University of British Columbia
(iii)Judge J.-C. Coutu, Provincial Court of Quebec, Itinerant Court of The District of Abitibi
(iv)Joe Norton, Grand Chief of the Mohawks, Kahnawake, Quebec
(v) Russel Barsh, Lawyer, Washington, D.C.
Discussion between panelists, and/or from the floor, if time permits

12:30 p.m.
Lunch

2:00 p.m.
Discussion groups (4), with reports to the Plenary (These workshops are closed to the public and the media.)

3:15 p.m.
Break

3:30 p.m.
"Future Strategies"
Plenary session (with reports from each group)
General discussion directed by the Chair

5:00 p.m.
Adjourn

Friday, November 25

The Problems Facing Blacks in the Administration of Criminal Justice in Nova Scotia - And Beyond: What Can Be Done?

9:30 a.m.
Introductory remarks - Chair

9:45 a.m.
"Blacks in the Nova Scotia Justice System - Past, Present and Future"
Burnley "Rocky" Jones

10:30 a.m.
Break

10:45 a.m.
Panel
(i) Esmeralda Thornhill, Quebec Human Rights Commission
(ii) Bromley Armstrong, Labour Relations Board of Ontario
(iii)Dan McIntyre, Executive Coordinator, Race Relations Directorate, Ontario
Discussion between panelists and/or from the floor, if time permits

12:30 p.m.
Lunch

2:00 p.m.
Discussion groups (4), with reports to the Plenary (These workshops are closed to the public and the media.)

3:15 p.m.
Break

3:30 p.m.
"Future Strategies"
Plenary session (with reports from each group)

General discussion directed by the Chair

5:00 p.m.
Adjourn.

Saturday, November 26

Rethinking the Role of the Attorney General in Prosecutorial Decision-Making

9:30 a.m.
Introductory Remarks - Chair

9:35 a.m.
Panel Presentation
(i) Professor John Edwards, Faculty of Law, University of Toronto, Special Adviser to the Commission
(ii) Richard Vogel, Q.C., Vancouver, former Deputy Attorney General of British Columbia
(iii) Morris Manning, Q.C., Toronto, Defence Counsel
(iv) Serge Kujawa, Q.C., Regina, Crown Prosecutor

10:30 a.m.
Break

10:45 a.m.
Plenary discussion

12:30 p.m.
Concluding remarks from the Chair
Brief comments from Chief Justice Hickman, Chair of the Royal Commission on the Donald Marshall, Jr., Prosecution

Description of Speakers

• *Mr. Bromley Armstrong* is a well-known community activist in Toronto who now sits as a member of the Ontario Labour Relations Board.

• *Mr. Russel Barsh* is an American lawyer and academic with wide experience in Native legal issues, and has written many publications on topics relating to Natives in the legal system. He currently lives in Washington, D.C.

• *Mr. Thomas R. Berger*, Chair of the Consultative Conference, has a wealth of experience with the law and with Native people. As a Justice of the Supreme Court of British Columbia (1971-83), as a lawyer, and as Chair of several commissions dealing with issues relating to aboriginal people, he has made a lasting contribution to the discussion surrounding the roles and aspirations of aboriginal peoples in Canada. He now practices law in Vancouver.

• *Judge Jean-Charles Coutu* is Coordinating Judge for the Itinerant Court of the District of Abitibi in Quebec. As such, he serves remote Inuit communities in northern Quebec.

• *Mr. Chester Cunningham* is Executive Director of Native Counselling Services of Alberta in Edmonton, an organization which has established several innovative programs for Native offenders and people in conflict with the law.

• *Professor John Ll. J. Edwards* is Professor Emeritus at the Faculty of Law and Centre of Criminology, University of Toronto. He is a leading expert on the Office of Attorney General and has written extensively on this subject. He acted as Special Advisor to this Royal Commission, and authored a series of opinion papers for the Royal Commission on the Role of the Attorney General, which appears as Volume 5 of this Report.

• *Professor Michael Jackson* teaches at the Faculty of Law, University of British Columbia, specializing in Native law. Recently, he authored an influential report for the Canadian Bar Association's Special Committee on Imprisonment and Release entitled, "Locking Up Natives in Canada".

• *Mr. Burnley "Rocky" Jones* has long been a leader and organizer of the Black community in Nova Scotia.

• *Mr. Serge Kujawa, Q.C.*, is General Counsel (Criminal Law) for the Department of Justice of the Province of Saskatchewan, in Regina. He is one of the most senior and high-profile Crown prosecutors in Canada.

• *Mr. Morris Manning, Q.C.*, is a well-known defence lawyer in Toronto. His many years as Crown counsel combined with his defence experience give him a very broad background on criminal justice issues. He has also authored legal texts and articles on criminal law and Charter of Rights issues.

• *Mr. Dan McIntyre*, originally from New Brunswick and former Race Relations Commissioner of Ontario, is now Executive Coordinator of the Race Relations Directorate, Ministry of Citizenship for the Province of Ontario, in Toronto.

• *Chief Joe Norton* was elected Grand Chief of the Kahnawake Reserve in Quebec in 1981. He has been involved in all aspects of self-government issues, including operating a Native peacekeeping force and a tribal court on the reserve, in an attempt to integrate broader contemporary laws with traditional Native beliefs.

• *Professor Samuel D. Stevens* teaches at the Faculty of Law, University of British Columbia and is Director of their Native Law Program which encourages the admission of Native students to law school and offers educational and other support to Native students during their legal studies.

• *Ms. Esmeralda Thornhill* is a lawyer, linguist and educator who has been working in the fields of human rights and anti-racist education for over 11 years. She now works with the Quebec Human Rights Commission.

• *Mr. Richard Vogel, Q.C.*, is a lawyer from Vancouver, and from 1977-83 was Deputy Attorney General for the Province of British Columbia.

Invited Participants

Professor Bruce Archibald - Dalhousie Law School, author of Commission research study entitled "Prosecuting Officers and the Administration of Justice in Nova Scotia" (published as Volume 6 of this Report), Halifax, Nova Scotia

Bromley Armstrong - Labour Relations Board of Ontario, Toronto, Ontario (Speaker)

Stephen Aronson - Barrister and Solicitor, Ottawa, Ontario

Susan Ashley - Commission Executive Secretary, Royal Commission on the Donald Marshall, Jr., Prosecution, Halifax, Nova Scotia

Yvonne Atwell - Black United Front, Halifax, Nova Scotia

Davies Bagambiire - Barrister and Solicitor, Halifax, Nova Scotia

Russel Barsh - Lawyer, Washington, D.C., U.S.A. (Speaker)

Marie Battiste - Grand Council of Micmacs, Eskasoni, Nova Scotia

Thomas Berger - Barrister and Solicitor, Vancouver, British Columbia (Chair of Consultative Conference)

Sherry Bernard - Black United Front, Halifax, Nova Scotia

Jim Bissell - Barrister and Solicitor, Department of Justice (Canada), Halifax, Nova Scotia

Hon. Alan Blakeney, P.C., Q.C. - Barrister and Solicitor, Toronto, Ontario, former Premier of Saskatchewan

John Briggs - Director of Research, Royal Commission on the Donald Marshall, Jr., Prosecution, Halifax, Nova Scotia

David J. Bright - Chair, Criminal Law Subsection, Canadian Bar Association, Nova Scotia Branch, Halifax, Nova Scotia

Fred Caron - Senior Counsel, Office of Aboriginal and Constitutional Affairs, Department of Justice, Ottawa, Ontario

Linda Carvery - President, Congress of Black Women, Halifax, Nova Scotia

Professor Innis Christie - Dean, Dalhousie Law School, Halifax, Nova Scotia

Alex Christmas - President, Union of Nova Scotia Indians, Sydney, Nova Scotia

Kevin Christmas - Union of Nova Scotia Indians, Sydney, Nova Scotia

Professor Don Clairmont - Dalhousie University, consultant to the Commission and co-author of Commission research study entitled "Discrimination Against Blacks in Nova Scotia: The Criminal Justice System" (published as Volume 4 of this Report), Halifax, Nova Scotia

Gerald Clark - Executive Director, Black Educators Association of Nova Scotia, Halifax, Nova Scotia

Stan Cohen - Coordinator, Criminal Procedure Project, Law Reform Commission of Canada, Ottawa, Ontario

Nadine Cooper-Mont - Deputy Solicitor General for the Province of Nova Scotia, Halifax

Thelma Costello - Executive Director, Public Legal Education Society of Nova Scotia, Halifax

Professor Brent Cotter - Director, Dalhousie Legal Aid, Halifax, Nova Scotia

Judge Jean-Charles Coutu - Provincial Court of Quebec, Coordinating Judge for the Itinerant Court of the District of Abitibi, Rouyn-Noranda, Quebec (Speaker)

Ian B. Cowie - Consultant, Ottawa, Ontario

Chester Cunningham - Executive Director, Native Counselling Services of Alberta, Edmonton (Speaker)

Robert Depew - Department of Indian Affairs and Northern Development, Self-Government Branch, Ottawa, Ontario

Anne Derrick - Barrister and Solicitor, Halifax, Nova Scotia

Frank Edwards - Crown Prosecutor, Sydney, Nova Scotia

Professor John Edwards - Faculty of Law, University of Toronto, Special Advisor to the Commission and author of a series of Opinion Papers for the Royal Commission entitled "Walking the Tightrope of Justice: an examination of the Office of the Attorney General" (published as Volume 5 of this Report), Toronto, Ontario (Speaker)

Honourable Gregory T. Evans , Q.C. - Commissioner, Royal Commission on the Donald Marshall, Jr., Prosecution, Toronto, Ontario

Dana Giovannetti - Department of Attorney General, Halifax, Nova Scotia

Chief Roderick Googoo - Vice-President (Cape Breton), Union of Nova Scotia Indians, Cape Breton, Nova Scotia

Associate Chief Justice Alvin Hamilton - Commissioner, Aboriginal Justice Inquiry, Winnipeg, Manitoba

Dr. Wilson Head - Urban Alliance on Race Relations, Toronto, Director and co-author of Commission's research paper entitled "Discrimination Against Blacks in Nova Scotia: The Criminal Justice System" (published as Volume 4 of this Report), Toronto, Ontario

Sakej Henderson - Grand Council of Micmacs, Eskasoni, Nova Scotia

Chief Justice T. Alexander Hickman - Chairman, Royal Commission on the Donald Marshall, Jr., Prosecution, St. John's, Newfoundland

John Hylton - Social Development Office, Regina, Saskatchewan

Professor Michael Jackson - University of British Columbia Law School, Vancouver, British Columbia (Speaker)

Dr. Anthony Johnston - Executive Director, Nova Scotia Human Rights Commission, Halifax

Burnley "Rocky" Jones - Halifax, Nova Scotia (Speaker)
Professor Archie Kaiser - Dalhousie Law School, Halifax, Nova Scotia
Steven Kimber - Halifax, Nova Scotia
Rita Smith - Confederacy of Mainland Micmacs, Shubenacadie, Nova Scotia
Serge Kujawa, Q.C. - General Counsel (Criminal Law), Department of Justice, Province of Saskatchewan, Regina, (Speaker)
Dr. Carol LaPrairie - Department of Justice (Canada), Ottawa, Ontario
George W. MacDonald, Q.C. - Commission Counsel, Royal Commission on the Donald Marshall, Jr., Prosecution, Halifax, Nova Scotia
William MacDonald, Q.C. - Deputy Attorney General (Nova Scotia), Halifax, Nova Scotia
Professor Wayne MacKay - Dalhousie Law School, Halifax, Nova Scotia
Reg Maloney - Vice-President (Mainland), Union of Nova Scotia Indians, Cape Breton, Nova Scotia
Morris Manning, Q.C. - Barrister and Solicitor, Toronto, Ontario (Speaker)
Howard McCurdy - M.P., Windsor, Ontario
Dan McIntyre - Executive Coordinator, Race Relations Directorate, Ministry of Citizenship, Province of Ontario, Toronto (Speaker)
Carol Montagnes - Director, Policy and Program Development, Ontario Native Council on Justice, Toronto
John Moore, Q.C. - President, Nova Scotia Barristers' Society, Halifax
Professor Brad Morse - University of Ottawa Law School and Director of Research, Aboriginal Justice Inquiry, Winnipeg, Manitoba
Barbara Murphy - Legal Services Society of British Columbia, Vancouver
Graydon Nicholas - President, Union of New Brunswick Indians, Fredericton, New Brunswick
Chief Joe Norton - Grand Chief of the Mohawks, Kahnawake, Quebec (Speaker)
David B. Orsborn - Commission Counsel, Royal Commission on the Donald Marshall, Jr., Prosecution, St. John's, Newfoundland
Dr. Bridglal Pachai - Executive Director, Black Cultural Centre, Dartmouth, Nova Scotia
Daniel N. Paul - Executive Director, Confederacy of Mainland Micmacs, Shubenacadie, Nova Scotia

Chief Lawrence Paul - Confederacy of Mainland Micmacs, Shubenacadie, Nova Scotia

Lloyd Perry, Q.C. - Barrister and Solicitor, Toronto, Ontario

Darrel I. Pink - Barrister and Solicitor, Halifax, Nova Scotia

Associate Chief Justice Lawrence A. Poitras - Commissioner, Royal Commission on the Donald Marshall, Jr., Prosecution, Montreal, Quebec

Al R. Pringle - Barrister and Solicitor, Department of Justice (Canada), Halifax, Nova Scotia

Professor Don Purich - Director, Native Law Centre, University of Saskatchewan Law School, Regina, Saskatchewan

Professor Edward Renner - Dalhousie University, Department of Psychology, Halifax, Nova Scotia

Joyce Robart - Black United Front, Association of Black Social Workers, Halifax, Nova Scotia

Viola Robinson - President, Native Council of Nova Scotia, Truro, Nova Scotia

Marc Rosenberg - Barrister and Solicitor, consultant to Law Reform Commission of Canada, Toronto, Ontario

Anthony Ross - Barrister and Solicitor, Dartmouth, Nova Scotia

Tom Sampson - Chair, First Nations of South Island Tribal Council, Mill Bay, British Columbia

Jamie W. S. Saunders - Barrister and Solicitor, Halifax, Nova Scotia

Associate Chief Judge Murray Sinclair - Commissioner, Aboriginal Justice Inquiry, Winnipeg, Manitoba

Professor Brian Slattery - Osgoode Hall Law School, York University,Toronto, Ontario

Amos Smalling - National Black Coalition, Vancouver, British Columbia

W. Wylie Spicer - Commission Counsel, Royal Commission on the Donald Marshall, Jr., Prosecution, Halifax, Nova Scotia

Professor Philip Stenning - Centre of Criminology, University of Toronto, consultant to the Commission and co-author of Commission research paper entitled "Public Policing in Nova Scotia" (published as Volume 2 of this Report), Toronto, Ontario

Professor Samuel Stevens - University of British Columbia Law School, Vancouver (Speaker)

Carolyn Thomas - Moderator, African United Baptist Federation, Halifax, Nova Scotia

Esmeralda Thornhill - Agente d'éducation, Direction de l'éducation, Commission des droits de la personne du Québec, Montréal, Québec (Speaker)

R. H. Vogel, Q.C. - Barrister and Solicitor, Vancouver, British Columbia (Speaker)

Florence Walsh - Native Council of Nova Scotia, Truro, Nova Scotia

H. A. J. "Gus" Wedderburn - Barrister and Solicitor, Halifax, Nova Scotia

Juanita Westmoreland-Traore - President, Quebec Cultural Communities and Immigration Council, Montreal, Quebec

Professor Bruce Wildsmith - Barrister and Solicitor, Dalhousie Law School, Halifax, Nova Scotia

Castor Williams - Barrister and Solicitor, Halifax, Nova Scotia

Dolly Williams - Congress of Black Women, Halifax, Nova Scotia

Roy Williams - Metro Toronto Police Commission, Toronto, Ontario

Max Yalden - Chief Commissioner, Canadian Human Rights Commission, Ottawa, Ontario

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Improving the Treatment of Natives in the Criminal Justice System

November 24, 1988

Opening Comments from Chief Justice Hickman

On behalf of the Royal Commission on the Donald Marshall, Jr., Prosecution, I welcome you to Halifax and to what promises to be a most exciting event. Many of you have had direct contact with this Commission either through the lengthy and exhaustive (some might say 'exhausting') public hearing process, or by providing important input to us in our research program. Others among you have had no formal association with this Royal Commission, but have followed the excellent and complete news coverage that has been given to our work. The common element drawing all of you here today is your interest and expertise in one or several of the difficult issues which we will discuss over the next few days.

The discussions will focus on two major areas: the particular problems of Black and Native Canadians in the criminal justice system, and different perspectives on the role of the Attorney General in prosecutorial decision-making. These issues have been raised in the public hearings and were also the subject of research studies prepared for consideration by the Commission.

In the case of the treatment of Natives and Blacks in the criminal justice system, it is clear that there are strong feelings in the communities that they have been poorly treated and that they are not served well by those institutions and individuals who collectively make up the criminal justice system. It is also clear that the Native and Black communities differ in many respects in their definition of the most appropriate solutions to these deep-seated and disturbing problems. But on one thing they agree: the system of justice, as it now exists, has failed to recognize and meet the needs of non-majority Canadians.

The appropriate role for the Attorney General in prosecutorial decision-making is of central importance to this Royal Commission. Issues of ministerial responsibility, accountability and independence, treatment of 'special cases' and relationships with the police have all been raised publicly, leading to concerns that, maybe, there are two levels of justice in Nova Scotia.

The public must have confidence that the Attorney General who, as the first Law Officer of the Crown, is not subject to directions from his Cabinet colleagues in the law enforcement area exercises his or her decision-making power fairly and impartially. We will undoubtedly be making recommendations to further this objective. On Saturday, we will hear from a panel composed of noted legal academics, defence counsel, Crown counsel, and a former deputy Attorney General. The presentation of this range of perspectives will no doubt lead to lively and thought-provoking discussion.

We have invited individuals and representatives of specific groups to assist us in defining problems and solutions. Many initiatives have been taken in other parts of Canada, and in the next few days we will have the opportunity to evaluate critically some of the options that might be appropriate for Nova Scotia. This forum is an attempt not only to define the issues that we must address in our recommendations but, more importantly to receive information and advice on possible solutions. These issues are not specific to Nova Scotia. We have here an opportunity to make recommendations for change which will have a positive effect on justice throughout the country. We, as Commissioners, are well aware of the complexity of the task before us. We ask you to share the burden with us for a few days so that ultimately our recommendations will come from an awareness of the range of debate that currently exists, and from an informed view of the political, cultural and practical consequences.

This is a somewhat unique forum. (I say 'somewhat unique' in that a similar event was held in another Inquiry which I chaired.) What distinguishes this forum from other conferences is that this event has been arranged for the benefit of the Commissioners rather than for the benefit of the participants. While we hope that all of you will learn something in the next few days, it is our primary aim that we learn from you. The Commissioners and Commission staff will be enthusiastic but primarily silent observers. It is for this reason that the meetings have been structured in the way they have, and why we have invited a limited number of people. We encourage you to be open and frank in the discussions, both in the private and public forums, in the hope that such debate will assist us in the weeks and months ahead.

We are fortunate that Mr. Thomas R. Berger has kindly consented to chair all sessions. Mr. Berger is eminently qualified to perform this duty and has had a wealth of experience in dealing with many of the issues which will be discussed during the next three days, particularly as they relate to issues involving minority groups and the Canadian justice system. Mr. Berger was called to the Bar in British Columbia in 1957, practiced law in Vancouver until 1971 and served as a Justice of the Supreme Court of British Columbia from 1971 to 1983. He was Chair of the British Columbia Royal Commission on Family and Children's Law in 1973 - 1974, was a Commissioner on the Mackenzie Valley Pipeline Inquiry from 1974 to 1977, and served, as well, as a Commissioner on the Indian and Inuit Health Consultation in 1979. He was Chair of the Alaska Native Review Commission which sat from 1983 to 1985. Mr. Berger was a Member of Parliament from 1962 to 1963, and a member of the British Columbia Legislative Assembly from 1966 to 1969.

It is with the greatest pleasure that I open this Consultative Conference and invite Mr. Berger to assume the chair.

Thomas R. Berger
Conference Chair

Thank you, Chief Justice Hickman. We've read a lot about the Marshall Commission in Vancouver, and I assume that all of you have across the nation. It is a tribute to the Government of Nova Scotia that they have set up such a broad-ranging inquiry to see what went wrong with the criminal justice system.

May I also say that it's a tribute to Chief Justice Hickman and his colleagues on the Commission that they have shown every determination to get to the bottom of this case and to dig out the truth. The truth hurts, but in a matter of this consequence, I think that it's absolutely vital to the integrity of the justice system that the people of Nova Scotia should have an analysis of what happened.

Now that the Commission has completed its formal hearings, it is concerned that it should lift its eyes, so to speak, from the specific facts of the case, and give some thought to the recommendations that it intends to make - not just the findings, what went wrong, but to give some consideration, in a constructive and creative way, to the question of how to ensure that it will not happen again. And that's why they've invited you and me to come and to give them what assistance we can.

The Commission has raised consciousness around the country about the issues the Chief Justice has just referred to: the way in which the justice system treats Native people, the way in which the justice system treats Blacks and other minorities, and the proper role of the Attorney General in determining who to prosecute and who not to prosecute.

As Chief Justice Hickman says, it isn't just Nova Scotia that is struggling with these questions. We have with us from Manitoba, Judge Hamilton and Judge Sinclair, the two Commissioners conducting the Manitoba Aboriginal Justice Inquiry, who are in the midst of considering questions that are very similar to those that agitated Chief Justice Hickman and his colleagues here.

We are going to be here for three days. The first day will be to deal with the issues connected with Native people and the justice system, the second day, with Blacks and the justice system, and the third day, with the question of the role of the Attorney General's Department.

May I remind you that, in a sense, we are speaking to the Commission and its staff. They are the folks who have to write a report and make the recommendations. And I can assure you that Chief Justice Hickman and his colleagues will be listening very attentively to everything that is said here.

What we intend to do today is to meet here, in public session this morning, to consider the views of our panelists, and then to break

into workshops during the first half of the afternoon. We will reconvene later this afternoon for a concluding plenary session on the issues that have arisen in connection with today's speeches.

Having said that, and so that we don't lose any time, I've asked our first panel to be seated at the table, and I will introduce the subject and then introduce the panel.

We have seen that in the last 15 years, there has been a real advance in Canada in the cause of Native rights. The courts in our country have now acknowledged that aboriginal title is a part of Canadian law. All three of our national political parties acknowledge the importance of settling land claims. All three of our national political parties acknowledge that the principle of Native self-government should be enshrined in the Constitution. They can't agree on how to do it, or on the details of Native self-government. Those are important questions, and we don't expect to solve them here today, but it shows that there is a consciousness among political leaders and among the public that didn't exist just a few years ago.

One of the questions that concerns Native people, so far as self-government is concerned, is the justice system. It is one of the features of Native self-government that may turn out to be vital, one that enables Native people to have a greater measure of control over the justice system itself, over law enforcement, over the courts themselves, and also over corrections and custodial arrangements.

Professor Michael Jackson, law professor at the University of British Columbia, will begin our discussion this morning by making a presentation that will lay out the issues. Among his many qualifications, he wrote a report for the Canadian Bar Association on the subject of Native justice that received much publicity last summer.

After Michael Jackson's presentation, I'm going to ask our panel to respond to what Michael Jackson has said, and to offer some insights into their own experience, and any recommendations they are prepared to make.

But first, I'll begin by asking Michael Jackson to come to the podium and to make his opening presentation.

Professor Michael Jackson

I have been asked to give a presentation which sets the stage for change. Setting the stage for change in relation to the administration of justice for indigenous peoples requires us to both reflect on the origins of Canadian Confederation as well as understand a vision of its imperfection.

I want to take you back some 230 years, when, in the city of Halifax, a treaty was signed between the agents of the British Crown and the Micmac Nation. The Micmac Nation argues that this Treaty

of Peace and Friendship of 1752 is the basis for their continuing sovereignty and ownership of their traditional territories. I want to read to you a statement made in 1761 by the then Nova Scotia governor, Jonathan Belcher. Shortly after the fall of the French forces in Quebec, he had renewed the Treaty of Friendship with the Micmac Nation. In doing so, he addressed the Micmac statesmen thus:

"I meet you now, as his Majesty's Graciously Honoured Servant in Government, and in his Royal name ... to build a covenant of Peace with you, as upon the immovable rock of Sincerity and Truth, to free you from the chains of Bondage, and to place you in the wide and fruitful Field of English liberty ...

The Laws will be like a great hedge about your Rights and properties - if any break this hedge to hurt and injure you, the heavy weight of the Law will fall upon them and punish their disobedience." (Public Archives of Nova Scotia; RG1, No 1.37, Doc. 14, 25 June 1761)

What has happened to 'that field of liberty'? What has happened to that 'hedge of protection'? The answer is that the field has been enclosed by high walls and watch towers. The fence is topped by barbed wire. Quite simply put, the field of liberty and the hedge of protection has, in fact, become the security of the prison. The mirror image of Governor Belcher's 1761 offer of a just society for the Micmac and for Indian and Native peoples across this country in 1988 is the promise of prison.

I want, very quickly, just to review with you those figures. Figures about crime and matters in relation to criminal justice are often open to all forms of academic and professional dispute. The figures in relation to imprisonment and Native people are so glaring that they permit little glossing over by statistical analysis and correlation curves. The figures, as I drew them for the Canadian Bar Association Report, show that Canada's Native peoples, while comprising two percent of the population nationally, represent 12 percent of its federal penitentiary population. In some provinces, the percentage of Native people in the prisons is as high as 60 percent, particularly in the prairie provinces. What is particularly distressing is that these figures are not getting better, because of the high rate of death among Native communities, and the fact that crime is a young person's business. Most people go to prison, when they do go to prison, as young people. The disproportionate representation of Native people in the prisons of this country is growing. It's not getting better. These figures also are not confined to Canada. Whenever and where ever there are indigenous populations, it seems that the prisons of those

countries are filled with Native peoples.

The question of course, is why is that? What is the explanation? It would be satisfying and easy to think that the explanation is simply that Native people are poor. Now it's well known that there is a correlation between economic and cultural deprivation and crime. Native peoples in this country - and I understand Native peoples in this province - live in poor housing situations, they have low incomes, little employment. It would be comforting to know that if we simply turn Native people into rich people, we could resolve the problem. We may not be prepared to do that, but it would be a simple solution and one which the criminal justice system really wouldn't have to deal with. Many people have said that the problems really lie outside of the criminal justice system.

It is my view, and I think there is now a consensus which has developed in the last 15 years, that the overrepresentation of Native peoples in our prisons is the result of a particular and distinctive historical process which has made them poor beyond poverty. And that process is the process of colonization, whereby we, as a dominant society, have come to North America and have sought to make over Native people in our image. That process has left Native people, in most parts of the country, dispossessed of all but the remnants of what was once their homelands. That process, supervised by Indian agents, implemented by missionaries, armed with the authority of the law, has systematically sought to undermine the very foundations of distinct Native societies. It's a process which is recognized as having the inevitable consequence of causing immense social and personal demoralization everywhere it has happened in the world. We have recognized the consequences of that in Africa. We have embarked and almost completed, with the exception of South Africa, the process of decolonization. In Canada, we haven't yet recognized that we have that problem. And yet, it is, in my estimation, the central problem which lies at the root of horrendous figures relating to Native people in the criminal justice system.

Once you accept that historical process as having those kinds of consequences, the answers seem clear as a matter of principle. It is to undo, to change the way we relate to Native people, to recognize their rights to self-determination as distinctive communities and nations within this country. That is the mirror image of colonization, a reversal of that historical process. Governments say that they are committed to it, but you - as Commissioners, as members of the judiciary, who supervise the results of that process in terms of Native peoples going to prisons and coming before the courts - have a particular responsibility to alert governments to the implications of

not following through on the entrenchment of the right to self-determination.

Entrenching the right to self-determination in the constitution, while a matter of immense symbolic and historical importance, will not, in fact, be a panacea. I want to very briefly look at some forms the right to self-determination could take in the context of the administration of justice.

Before doing that, there are a number of things which have to be very clearly borne in mind. The first is that we have to be acutely aware of the stereotypes we bring to the issues affecting Native people.

Some of those stereotypes are that Native people are without institutional frameworks. They are peoples without history. They are unsophisticated societies. Hugh Trevor Roper, Professor of History at Cambridge University, described African peoples as people without history in writing of Africa only a dozen years ago. He said history started when the Europeans came to Africa; before that, there was only darkness. And I think that's an assumption which many people hold in relation to Native peoples. If you look at the historical record, you find that on the east coast, the Indian Nations, the Six Nations of the Iroquois Confederacy, the Micmac Confederations, were in fact sophisticated societies with a well-developed institutional framework. They had their own modes of government and adjudication which had been developed or in place for thousands of years before Europeans even came here. One of the remarkable things we as a society in Canada don't know about the historical record is that in the 18th century the diplomatic language was the Iroquois language. The metaphor of treaty-making in the 18th century was the Iroquoian metaphor.

The second thing we have to be very clear about in terms of stereotypes is that Native societies are our equals and are our contemporaries. We have this way of placing Native people in a historic time warp. They are traditional societies. Any modern references are mirror images of our society, not theirs. It's important to understand that Native societies are inherently dynamic. They would not have survived in North America for the millenia without that ability to change and to adapt. The history of trading on both the east and the west coast has shown the enormous ability of Native people to adapt. It's important to understand that, because in trying to come up with contemporary reference points for justice, we must understand that Native people have a long tradition of dealing with these matters themselves.

There's another matter about which we have to be very careful. We have a tendency to assume that the common law and, to some extent, the civil law method of adjudication and resolution of disputes is the

only way to do it. It's the only way we have done it for many hundreds of years. That, I think, gives us a very limited vision on what is possible. Native people have, as I've said, for millenia, resolved disputes within their communities. They have done so not with the use of courts and not through the use of prisons. They've done it through a process of community decision-making, through the process of conciliation, through processes which attempt to restore harmony within the community. These principles of conciliation and of reconciliation, principles of restorative justice rather than retributive justice, are ancient principles in North America. It's something of a paradox, therefore, that in August the Report of the Standing Committee on Justice and the Solicitor General, under the chairmanship of David Daubney, in a landmark report on the justice system, pointed out that there was a need to reorientate how we approach sentencing in this country. There was a need, in fact, to incorporate principles of restorative justice into the legal imagination. That is radical in the literal sense. It's radical in returning to the roots of adjudication and resolution of disputes in North America. It, in fact, reflects the indigenous way.

What this also points to is that we have a need in this country to take seriously the issue of legal pluralism. We have, for the last 200 years, seen the legal horizon divided between the common law and the civil law. We need to take constitutional legislative cognizance of the fact that there is a legal order of indigenous people, with not only their own customary laws, but also their own methods of adjudication and dispute-resolution. What we also need to understand is that Native peoples are diverse. As Tom Berger, in another context, has said, their languages are as diverse, and in many ways, more numerous than the languages of Europe. We have a tendency to insist upon a spurious unity of the Native people. Why can't they get their act together? Why can't they come up with one proposal? That is a completely unreasonable and unacceptable demand. It has taken the European community 1000 years to come up with an economic union. The range of possibilities for Native people in making the justice system theirs is not one which has one facet. We have to be prepared to look at a variety of arrangements, a spectrum of possibilities which may look very different from the existing system, which may incorporate aspects of the existing system. All of those have to be looked at and canvassed, not with a view to finding the best one, the panacea to all our problems, to all their problems. But we have to be cognizant of the need to take seriously the diversity, as we take seriously the fact of their right to chart their own course.

One of the things I did for the Canadian Bar Association was to look at the range of possibilities. One possibility which has often

attracted attention is a separate system of adjudication for Native people, the idea of tribal or aboriginal courts.

We have a unique opportunity here in Canada to learn from what others have done. While the American courts early on in the history of that country recognized a residual tribal sovereignty, the first tribal courts established in the United States were not an exercise in self-determination. They were, in fact, a concerted effort by the federal government, as part of its detribalization policy - a policy which had its references in Canada as well - to establish a court system through which Indian agents could better administer reservations by overseeing and controlling the dismantling of the reservations, the allotment of the reservations into individual land holdings and the undermining of the authority of tribal governments. So they do not provide a model for the implementation of a separate system based upon respect for the diversity of Native people and their rights to develop their own institutions. The second wave of Native courts came in the 1930s under the rubric of Indian legislation which was designed to return to the tribes a measure of autonomy after the disastrous experience of detribalization. As a result, these tribal codes and tribal constitutions and the procedures of those courts were ones shaped by federal bureaucrats, not by Indian people.

In the last 20 years tribal courts in the United States have sought to wrest back control of the courts from those dubious origins. They have sought to make them over in ways which make sense to Indian people. Indian lawyers have sought to rewrite the tribal codes and to upgrade the procedures. But those courts are still bedeviled by many problems, one of which is the complexity of their jurisdiction. The tribal courts have been consistently attacked by those outside of the Indian territory, both by the state and by the federal government, seeking to undermine and to encroach upon their jurisdiction. The courts have been embroiled in litigation throughout their history because of their inadequate resources, and the claims by many that they gave second class justice. The federal government unilaterally imposed upon them the requirement that they abide by certain provisions of the Bill of Rights which caused enormous problems for understaffed and underresourced courts.

In Canada we can learn from that experience. There's a plethora of problems and issues which have to be looked at in advance if you are contemplating a separate system of aboriginal justice. What kinds of cases will they adjudicate? Will it be limited only to Indian victims and Indian defendants? What happens if the crime happens off the reservation? There are all kinds of problems which can be explored in advance and should be explored in advance to avoid the quagmire of problems which the American courts have had.

We also need to consider the extent to which we can reach an accommodation between aboriginal law ways, the common law and the Charter. I don't think that accommodation is beyond our imagination. I think it's possible to design processes which incorporate the best of our systems, and that includes incorporating a system of procedural protections with respect for community decision-making.

We must also recognize that in the United States, and to some extent Australia, tribal courts have been shaped by non-Indian agendas. When we are looking at aboriginal justice systems in the Canadian context, we should not blinker ourselves to looking at courts as we understand them. Chief Tom Sampson from British Columbia, who is in the audience today, is in the process of designing a system of aboriginal justice which does not rely upon courts at all. It relies upon the elders; and it relies upon traditional mechanisms for adjudication. The energy which that kind of endeavour is generating in British Columbia is something I hope Chief Sampson can share with you before the end of the session. We must not limit ourselves to the idea of a court as we understand it.

This becomes much clearer if you look at the experiments which are taking place around the country in relation to diversion and sentencing. Judges have sought to reach an accommodation with Native communities in a variety of ways. There are experiences in which some judges have started to sit with Native elders or Native community members, as assessors, to delegate or defer to them responsibility for coming up with constructive solutions as alternatives to incarceration.

There are also opportunities in the form of court worker programs. Court worker programs are, in fact, a leading edge into many other kinds of areas in which Native organizations and communities have sought to wrest back control for the lives of their members, particularly the lives of their young people from a system which has discarded them. But it's very important that we not see court workers as the panacea. You can recommend there should be a court worker system for Nova Scotia. The case to be made is unanswerable, but to place on a small number of court workers the burden of changing the system would be a burden which will break their backs. It is an important part of a spectrum of proposals, but it cannot be the only one.

There have also been developments in the international law arena. Native people have rediscovered the potency of international law. They have realized that international law accorded them an important status in its early development which Canadian law has not yet achieved. They are able to see that, on the international scene, there are ongoing efforts and discussions about the recognition and

implementation of the right to self-determination. In other parts of the world the national agenda now includes these kind of items we are now discussing.

You, as Commissioners, stand at an important threshold, not only nationally, for these are issues which are being faced in many other parts of the country, but also internationally for the international community is coming to grips with a vision of what future the indigenous peoples of the world should occupy in the nations of the world. And that is part, I think, of the vision we have to have of this country.

I think your recommendations have to be put in that larger context. That fence and that hedge that I talked about in the beginning has to be dismantled, and I think we have to recognize that the cultivated fields of liberty can bear an imprint other than our own and I believe they have to bear an imprint other than that of our own, if we really are to have a system of justice and a perfection of a just society in this country.

Thank you.

Chester Cunningham

In 1963 I took a job at the Native Friendship Center in Edmonton. I was asked to be the Program Director at the Native Friendship Center, and when I got to the job I asked the Executive Director, "What programs do I direct?" And he said, "You find the programs that you're going to direct." And I said, "Well, okay, that's okay." Then I asked him where the money was and he said, "Well, you find the money too."

After working at the Friendship Center for two or three months, we had a tutoring program, a referral program, and we were working with housing, assisting people with employment. But I kept getting people coming to me and saying they had to go to court. I wandered down to the court house one day and walked in and sat down in the court room which handles arrests and new cases, and was shocked at the number of Native people appearing in front of the judges. I came in late, but I counted 63 Native people, and none of them were on bail; they were all in the lock-up, coming out. I watched the process. The clerk would ask them to identify themselves. There was no word; there was a nod of the head. The charges would be read; there would be a nod of the head. The judge would ask, "How do you plead?" Nod of the head, and "You got anything to say?" Nothing, and they were sentenced. Most were minor charges, charges under the old vagrancy provision, as well as drunk in a public place, and shoplifting. I sat in for two or three days, and then finally decided maybe this is an area where we can get a program going.

I asked three of the judges to go for lunch one day, and was quite surprised at their reaction when I said, "I'm concerned with the large number of Native people going through the courts, and with no communication from them, they're being sentenced." And all three of them said, "We are concerned too because we should hear everything, not just what's in the police report, in order to deal fairly with people." They told me to sit and observe for another couple of weeks and then we'd get together for dinner and see what we could do.

Well, it didn't last that long. The next morning a young lady stood up, the first prisoner out in the morning, and she looked at her feet and didn't look at anybody. And I'm one that doesn't sit still, and I stood up and I said, "Your Honour, is there some way that I can talk to her. Maybe I can help her?" And the judge told me that I could. He said, "You go downstairs; there's a sergeant there. You tell the sergeant that you've been asked to speak to the female prisoner upstairs." So I went down, ran into a big Irish sergeant down there, and he asked who I was, and I told him. And he said, "Where are you from?" And I said, "the Native Friendship Center." And I said, "I've been asked to interview the female prisoner upstairs." His comment was, "We have enough damn do-gooders around here without having a bloody Indian." I didn't stop to discuss it with him. I came upstairs and I came in the Judge's door, not the public door. Judge Carl Rolf said, "Did you have a problem?" And I said, "Yes, I did, sir." And he said, "What happened?" And I said, "Well, I ran into somebody at the cellblock who didn't exactly like Natives." But I said, "We'll discuss that later. How do I get in to see the female offender?" So they let me in through the prisoner's docket with the matron present, and after about half an hour of talking Cree with her, I found out what the problem was. The charge was obtaining a taxi ride by fraud. She had been instructed to come to Edmonton, get off at the bus depot, hire a cab, go down to her sister's place, and her sister would pay the cab. She didn't give the driver a full address, she said it was 156th Street, but she was from a small reserve, close to a small community, and she thought she could identify somebody on the street, or somebody would see her. After she ran up a bill of $39.60, the driver dropped her off at the police station, and she was charged with obtaining a cab ride by fraud. When I got the story from her and confirmed it with her sister, I come upstairs and brought it to the attention of the judge, who called the prosecutor in, and we sat down and they withdrew charges. And I offered to drive her back to Edmonton to her sister's, and she said, "No, I'm going back to Calling Lake," which is 150 miles out of Edmonton. I keep in touch with her, and she hasn't come back to Edmonton. That was her first and only experience.

The next morning, when any of the Native people hesitated, the judge would put them over to the end of the list, and it got so that the end of the list was as large as the original list, and we would interview them. It was a simple process. We didn't tell them how to plead. We interpreted the criminal justice system. We told them what their rights were: they could plead guilty; they could plead not guilty; they could reserve their plea; they could ask for bail. And we'd instruct them on what information the judge would want in order to grant them bail. And the judge says, "Okay, we'll start dealing with some of the liquor charges, and the lesser charges." And that didn't last very long. About two weeks after, a young Native fellow shot a Mountie, and I was called at three o'clock in the morning to go and interview him. The prosecutor phoned and asked me to go interview him before they got to him. So, it really caught on to the point where we found that we had to go to court at seven o'clock in the morning to the cellblock and interview the people before court started.

There was a real reluctance on the part of the prosecutor and the police when we first started because they said, "They're going to jam the courts up, and they slow down the process." But they found out that the process wasn't being slowed down. We would encourage the Native people to speak for themselves, and if they didn't speak for themselves, we would speak for them. It got so that we'd walk into the court and the prosecutor would say, "Did you interview John Twenty-Toes?" And I'd say, "Yes." And he'd give me the police report, and he'd say, "Well, what did you get?" And then we'd start plea bargaining with him, "Well, I don't think I have enough here for the more serious charge, we'll accept a plea on a lesser charge." And I'd say, "Well, I can't tell you, I'll have to talk to the client." There was no legal aid at that time. For some of the more serious charges, we would convince the Attorney General to appoint a lawyer for them. We also had a handful of lawyers who were concerned, and who would take some of the cases.

In 1969, when the Alberta Government was looking at the Native organizations to get the Native communities doing more for themselves, they did a need assessment throughout Alberta, and at the top of the list was a court worker program.

I left the Friendship Center, and with the blessings and the resolutions from the Indian Association of Alberta and the Metis Association, I set up a separate organization. We called it Native Court Worker Services, because that was what we were going to do. We recruited four court workers, and put them into four of the communities, and then looked for a non-political structure by which to set up the board. We divided Alberta into seven different areas and asked for two names from each area, and when we got the names from the two associations, I sat down with the Vice-President of the

Indian Association and the Vice-President of the Metis Association and selected a seven-member board. They are the society; that is the extent of the society. The board has been really effective. They deal with policy, I do the fundraising, I administer the programs, I hire people, I fire people, and it's worked out really quite well.

But in 1970 when we started branching out from Edmonton, we found that the Native people in other areas knew nothing about the criminal justice system. When you'd ask a person why he pleaded guilty and they would say, "Well, what chance would I have when I go into court and I'm outnumbered seven to one?" And they didn't know that the judge had a particular role, the prosecutor had a role, the clerk, the turnkey, and everybody else. The way they saw it was that the same group came in the same vehicle, and they'd already decided his fate.

So we decided to start holding workshops. In 1971 we held 280 workshops throughout Alberta, in every reserve and every Native community. The Province sent a directive out that the judges, the prosecutors and the police had to attend. In fact, in one area, the Native people wanted the undertaker to attend because they thought they were getting shafted by the undertaker. In another area, they wanted the priest. They said the priest has more responsibility in this community than just saying mass.

The workshops developed into a really interesting process. In the first session, the resource people did all the talking. But about three weeks after, you'd get a letter or a phone call, "We want those people back; we now have questions." And we'd bring the people back, and they'd start asking the judges some questions, and the third time we'd come back, the Native people would say, "Bring them back; we want some answers now." And we'd bring them back.

One of the judges said that he was tired of issuing warrants all the time for non-appearance in court. And the Native people said, "Well, you know, the police tell us we have to appear in court, we appear in court. We figured we've made our commitment. And the police say, 'No, when your name is called, you're supposed to stand up.' Well, nobody told us that, they just said appear in court."

The judges would say, "Well, how come you don't appear in court?" And I remember little Alice Mustus, who was about four foot ten or so, stood up and said, "Hey, Mr. Judge, when you drive by here in your green Lincoln on Wednesday morning, and we're hitchhiking, you don't pick us up; we don't go to court." The judges didn't realize that transportation was an issue for them to get to court. So when the judges found out it was a problem, we worked with the judges; we ended up getting court on the reserve. Because it was costing a dollar a mile at that time, to get to Marethorpe. A dollar one way, and sometimes to pay a fifty dollar fine. The Native people also

informed the police, that "You know, in Western Canada the RCMP were set up to protect the Native. The only time we see you is when you come to arrest us. Why don't you come and get to know us. We'd like to get to know you."

They also worked with the RCMP and said, "When you get a new constable, introduce him to the community. Come out and see us; don't start arresting." It made quite a difference in attitude of the correctional personnel. They started to realize some of the problems that the Native people were having.

Then it seemed that the two associations that created us kept adding things to our mandate. But we decided as an organization to stay within the criminal justice system and child welfare. With our court workers out in the field and people being remanded to institutions, we were spending a lot of time in the institutions, talking to some of the inmates that were there on remand, and we ended up getting a Native liaison program for the Drumheller Penitentiary in 1972, where the person worked for us inside the institution and acted as a liaison between the Native people and outside organizations. Well, the role slowly developed to the point where the person was also a liaison to the correctional facility. We started assisting them with their release plans and appearing with them in front of the Parole Board.

A year later, the Province asked us to put liaison people in their provincial prisons. We hired five to go into the Native prisons. It seemed as we got going with the Province as well and establishing credibility, that we weren't a fly-by-night organization, that we were there to stay, they kept asking more of our court workers. I remember the chief provincial Family Court judge asked us, "You provide a service to criminal court. Why can't you provide it to us? We have the same problems." So we went out and got funding to put the juvenile and family court worker program together. I now have 32 criminal court workers throughout the province. We cover the area. I have 28 family and juvenile court workers which also handle young offenders. And I have two separate contracts for young offender court workers in the cities. We attend courts every morning in areas where there is a large Native population.

After the workshops, the RCMP also started to phone me and say, "Why don't you get your court worker down here to the cells every day? Some of these people we don't want to charge. Some of these people, we feel, if somebody will steer them to a treatment center or counselling program, we don't have to charge them. And we would sooner work that way." So we started attending, going to the cells and talking to the people and making a commitment to the system that we would look after the people.

Eventually we developed a training and media package on problems that were coming up in the reserves. I know we had a glue sniffing problem with one reserve, so we went there. We tried to find a package on drugs and glue sniffing, and we couldn't, so we did our own video on glue sniffing. We started using these in our workshops, and we continue to hold workshops throughout the province on different topics. We held 108 when the young offenders legislation came in.

We try to get into diversion, and I think we had an excellent diversion project up in the High Level area. We thought we'd try it in an area where up to 15 years ago we couldn't get somebody to speak Slavian English. We had to interpret from Slava to Cree to English and then back. We tried a High Level project out there, and we felt it was working, but money talks. The Attorney General said there aren't enough numbers to warrant the program, so they cut off the funding. And we felt that the project was working.

But the Solicitor General and the criminal justice system are starting to depend on us. We'd get up and speak to sentence, and the judge would say, well, you supervise this person on probation. So we negotiated a contract with the provincial community corrections to do probation supervision. And we now do most of the probation supervision in Alberta. We also do most of the parole.

But when the Native people were still going to the bush camps or going to jail and not getting benefit of the programs, I approached the Deputy Attorney General, and said, "Can we look at setting up a minimum security bush camp and offer some programming?" So we set up a bush camp at Beaver Lake and we didn t take prisoners directly from the courts. That was deliberate, because as soon as I mentioned to the judges that we had a bush camp, they wanted to fill it. And I said, "No. Let's go through the normal process. If you're going to give somebody probation, let him try probation. Don't send him directly to our camp." So, now we get fed by a parent institution, and we still have the Beaver Lake security camp. We had to do a lot of wheeling and dealing with the Provincial Government. But we set up a second bush camp, up in Blackfoot country west of West Castle, and we operate it the same way.

We took over the Grierson Center jail from the Province in May of this year. We now have a 40-bed prison operating in the City of Edmonton that's staffed and operated by my staff.

We started to do some support programs. We developed our own Life Skills Program. We call it Family Life Improvement. We started it with some of the mothers who were going to Family Court as a last ditch attempt to keep their children. We discuss everything in the sessions. We conduct them four days a week in Edmonton, and we get clients from not only our workers, but from social workers and

from corrections people. But we've expanded that program. We're taking it into jails now, into the federal corrections, provincial corrections, and it's an excellent program. And we're hoping to get money to expand it throughout the province because it seems to be quite effective as a treatment module for people in difficulty.

We are also involved in young offenders probation and started to do supervision on young offenders. We ran a juvenile halfway house. It's an independent living skills program; we take young offenders between the ages of 16 and 18 and rent an apartment for them. This is another case where we learn the White man's ways and get away with it. If we had said halfway house, we would have had to go through zoning by-laws, so I bought an apartment building and, on paper, I'm renting to the young offenders, so we didn't have to go through zoning by-laws, and now have our halfway house anyway.

But we also started to run Native awareness training, and we run the Native awareness training for correctional officers, police forces, social workers. We're now going into the university and running it for teachers that go out into the community. And we feel that Native awareness is not a one-shot thing. We encourage our staff to work with the police and the correctional people who attend the training on an on-going basis.

We also have an elders program that goes into the jail. We tried an elders program in 1974, where we had a sweat lodge in the Drumheller Institution and we kept bringing elders in. So we have an elders program for all of the federal correctional institutions and the provincial institutions, both young offender and adult.

And we have two exciting programs that we just started within the last year that we're quite excited about. For a while I was against traditional justice programs run by the Native people. I didn't think a lot of the Native communities were ready for it. We've since gone into Denetah Youth Project up in Assumption. People there were concerned about the large number of youth from that reserve being placed off the reserve, either through child welfare or child offenders. And they wanted to keep the youth there. So we got money. We convinced five different provincial departments and two federal departments to put money into this project at Assumption, and that we would be answerable only to the Solicitor General on the project. And it's really had some positive results. We ran a bush camp, a summer camp, the first two months, and we paid for two adults, two elders to come in, and before the two weeks were up at the bush camp, 14 elders had come in. Twelve of them came in on their own. They call it the "talking drum project" because when the elders sit down and talk to the youth, they start playing the drum and singing. But it set up a format for the elders to talk with the youth, and the crime in that community went down, because the elders are

saying "we're finally coming back to raising the youngsters. That's our responsibility, to teach the youngsters, and we're finally getting back to doing that."

I think most of you have heard about the Peerless Lake tragedy where the six young people drank the copying fluid. Well, there are three communities in that area - Peerless Lake, Trout Lake, and Loon Lake. And we've moved there with the youth group and it's having the same effect. In fact, the isolated communities are asking us to get involved with them in getting some community development going.

Another project we just tried is a crime prevention tour. When crime prevention first came up, I went into the isolated communities and ask them what their version of crime prevention is. They said "Shoot the judges and the police." I chuckled when they told me that until they told me that one of the communities, Red Earth, didn't have a telephone, and whenever something happened on a Friday night, and most of the crime in the Native community happens on weekends, that by the time they had access to a phone, they had solved the problem themselves. Now with access to a phone, the police come in, have to justify their visit, they lay charges, a party of foreigners come in and hear the charge, take the fellow out, and he serves his time out of the community. They said, "We have no ownership." The only way we're going to get anywhere is if we start getting ownership in the programs that are dealing with us.

Thank you.

Professor Sam Stevens

The kind of thoughts I'd like to share with you are related to three areas: first, the root cause of the Donald Marshall case, in my opinion; then how do you accommodate aboriginal peoples within the present criminal justice system; and finally, the development of a parallel justice system.

To begin, I'd just like to succinctly put the problem which I feel is at the root of the Donald Marshall case. During the past 200 years, aboriginal peoples have tried to maintain their distinct culture. This has been a very, very difficult process because the dominant system has not seen the need, in my opinion, to recognize aboriginal peoples' own institutions of law, politics, land tenure, etc. For the most part, this has been premised on this notion that 'they should be like us.' In other words, the dominant society has felt its institutions of law, education and politics were the benchmarks that should be emulated by aboriginal peoples.

The aboriginal peoples have maintained that their values, their institutions and their philosophies are markedly different from the present dominant society's values and institutions. They say that if they are to survive as a culturally distinct group of people, they must

have the option of being able to practice their cultural and traditional laws and to be able to utilize their traditional institutions.

Further, they say that the dominant society must recognize that their institutions have validity within the dominant system's institutions. At the very minimum, they say, they must have protection within the dominant system if they are to survive as a culturally distinct group of people.

Assuming for the moment that this is the fundamental problem at the heart of the Marshall Commission, what then can be done to begin to resolve this dilemma? Well, one of the things that the dominant system prides itself on is legal representation. In fact, the dominant system says that it guarantees to every accused, to every offender, legal representation. But that does not always mean, in my opinion, that it will be fair, legal representation. In fact, in 1973, when the landmark case, *Calder* v. *Attorney General of British Columbia* was decided by the Supreme Court of Canada, we had three aboriginal lawyers in the whole of Canada. There are very few aboriginal lawyers, even yet, in Canada, approximately 100 out of a population of 34,000 other lawyers. In the Maritimes, there are even less. My understanding is that there is one. Now you may say that the legal profession will always give fair and good representation to aboriginal peoples. But I'm reminded of a case when I articled with the Department of Justice. In a conversation with a defence lawyer, I told him that one day I wanted to practice law as a defence lawyer, and he told me that I could have all the Indian clients I wanted. He intimated to me that there were two classes of criminals: the Indians and the rest. From that time on, I've often wondered how many other defence lawyers within our criminal justice system have a difficult time, because of their cultural background, empathizing with aboriginal peoples.

At the University of British Columbia, we've attempted to ameliorate this problem, as have a lot of other law schools across Canada. We have the Native Law Program, and since 1984, we've tried to do our best to access law school for aboriginal applicants, and to graduate them. We've done it in a number of ways. We actively go out and seek aboriginal people who are interested in working with their people in a legal profession. That is, working at the high school level, encouraging these people as role models, to begin to develop their academic skills so that eventually they will come to law school.

At the present time, most of our aboriginal peoples do not have the academic background to access law schools. That's not to say that they can't complete law school, but they don't have the academic background to get over that first barrier which is access to law school. It is the same as any law school across Canada. In order to

get into law school, you have to be the cream of the crop, have better than a B- average, and an LSAT score of no less than 36 out of 48. Most of our aboriginal peoples are just not there. So we have accepted them in the discretionary category, basically on the premise that as long as they have their skills developed to the point in time where they can handle the law school workload, then we will accept them into law school. Practically speaking, it means two years of university, and an LSAT score of no less than 25 out of 48.

But that isn't enough for a law school to do, in my opinion. You also need to put in place a support program. I think we've done a very good job of that at the University of British Columbia. It's not something we make mandatory for all Native law students, but it is more along the lines of a coaching experience. We help them to develop the arguments so that they can make those arguments on the law school exams. We help them to understand the methodology of studying law, help them to solve their personal problems as they're going through law school, and help them to access funds so that they can stay in law school.

We have gone further at the University of British Columbia in adding aboriginal courses. This is a must, if we are to begin to solve the problems that aboriginal peoples have in getting non-aboriginal peoples to understand their problems.

The report of the Canadian Bar Association Committee on Aboriginal Rights in Canada recommended this summer that studies in aboriginal law be actively promoted in Canadian law schools and, further, that law societies undertake professional seminars and workshops on aboriginal legal issues.

It is my recommendation, Commissioners, that the law schools at Dalhousie University and the University of New Brunswick be provided with the funds to put in place an adequate affirmative action plan to graduate aboriginal people with law degrees, and that both law schools and the law societies undertake the development of relevant aboriginal law courses and seminars for all students and lawyers.

I think it's also fair to say that aboriginal people throughout Canada have little or no knowledge of their rights within the criminal justice system or how the courts work. There have been various and many attempts to help aboriginal peoples understand their rights. Most have not been successful. There needs to be, in my opinion, a concerted effort made by the law societies across Canada, more particularly here in the Maritimes, to provide this kind of information in an appropriate manner to aboriginal peoples. This could be done by providing education funding to sensitize aboriginal peoples about their basic rights and how the court system operates.

I've been involved, over the last year, in teaching law courses to aboriginal peoples at the reserve level, most recently with the Canim Lake Band in northern British Columbia around Williams Lake. The courses deal with a number of areas that help them to understand their rights within the dominant system. I think it's a minimum that we must do as Canadians if aboriginal peoples are to adjust to the dominant system.

Another example was a course offered by the University of British Columbia at remote areas to band social workers on Vancouver Island. These social workers met for a period of three months, and I taught them the course which covered the Charter of Rights and Freedoms, young offenders legislation, family law legislation, child welfare legislation, federal and provincial human rights legislation. As a result, each of the workers was equipped to understand what aboriginal peoples' rights are in the areas they work in. The hope is that these social workers will be paralegals and help aboriginal peoples at the reserve level understand what their rights are.

So it is my recommendation, Commissioners, that monies be set aside to assist aboriginal communities to better understand the present justice system, and to understand their legal rights in key areas.This is necessary if we are to begin to resolve the terrible dilemma that we see in the Donald Marshall case.

A good example of this is the young offender diversion program that the First Nations of South Island Tribal Council have proposed. Their proposal is to accept responsibility from the present criminal justice system to develop and implement a plan in conjunction with the young offender on how to rehabilitate the young offender using their traditional family law, and then report back to the criminal justice system once rehabilitation has been attempted or accomplished. It's a good example, I think, of what can be accomplished within the present justice system to give meaningful participation to aboriginal people.

So, it would be my recommendation, Commissioners, that a task force composed of a fair representation of non-aboriginal and aboriginal people be set up to explore how aboriginal communities can be involved in a meaningful way in the present criminal justice system.

I finally want to touch on, very briefly, the development of a Native justice system. There has been much written on the reasons why aboriginal people should be given the opportunity to develop and operate a justice system which meets their needs. The all-party Special Committee Report on Self-Government in fact recommended that aboriginal people be given the right to govern themselves. Included within the powers given to First Nations, they said, should be the power to legislate on justice and law enforcement. We all

know that the four First Ministers' Conferences dealing with the right to self-government came very close to accomplishing this purpose for First Nations. That process, I think, faltered in part because some of the provinces were not at all sure what these First Nation self-government institutions would look like. It's my view that part of the hesitation with supporting aboriginal justice systems is that the present Attorneys General are not clear as to how an aboriginal justice system would work.

The range of possibilities could go all the way from administering part of the present justice system to establishing the parallel justice system I think aboriginal peoples are looking for. For the most part the Attorneys General would have less problems with implementing the aboriginal courts patterned after the present justice system. They would, however, in my opinion, have great difficulty accepting aboriginal courts which applied traditional customary law. The main stumbling block seems to be the issue of recognition and application of traditional law within the aboriginal court system and secondly, the recognition of traditional law within the present justice system.

The justification for the recognition is quite simply that aboriginal societies must be allowed to use and enforce their traditional laws in order to survive. In order for them to get justice within our present justice system, the system must recognize the traditional laws and apply them.

Part of the problem with that is to understand what this customary traditional law is. It must be written down so it can be analyzed from the standpoint of fairness, Charter of Rights, et cetera. This, in my opinion, will be a major undertaking as much of the traditional customary law has not been used in some time in many communities. It will mean researching it from elders, from anthropologists and others, and then validating the law with the aboriginal communities, to make sure it is the customary law of that First Nation. Having said that, I'd like to make two recommendations.

The first is that a task force be set up to review the effect of the recognition and application of traditional law in an aboriginal court and in the present justice system.

And my second recommendation is that at least two aboriginal communities within the Maritimes be funded to research and write down their customary law.

Thank you.

His Honour Judge Coutu

I'll try to share with you my hopes and views, which are the hopes and views of an old private soldier who is on the front line of fire, hearing cases in the northern community for 14 years.

Actually, I'm what is called the Coordinating Judge for the Itinerant Court of the District of Abitibi. There are three other judges involved in this community and we hear civil cases, criminal cases, and act as Youth Court Judges. The district we cover, the district of Abitibi, is north of Schefferville, and includes all the Ungava Bay, Hudson Bay and James Bay area, and also the Hinterland Cree Community. In this area, eight villages are Cree villages and all the others are Inuit territory. Since 1974, I have been travelling in all the area. We now sit 27 different weeks in the North. We have a circuit in James Bay, one on Hudson Bay, another one on Ungava Bay, and a fourth one we just began last year, with the Cree Hinterland Community. From Amos to Kuujjuaraapik to Salluit, which are more northern villages, is about 1600 miles. From Salluit to Kuujjuaraapik is a three-and-a-half hour trip by Twin Otter. And if there is a lot of wind, it's four-and-a-half hours instead of three-and-a-half.

My remarks will be divided in three parts. First, for a better understanding of the orientation we want to give to the administration of justice in Quebec's Native communities, it is important to do a short historical survey of our impact in the northern Quebec Native communities. In the second part of my remarks I will describe the different proposals made by some of the parties involved in order to reach a greater participation of Natives in the administration of justice. Finally, I will give you some of my personal views on the subject and some guidelines I think should be taken into consideration by all those involved in the delivery of justice to the Native people, be it in Native communities or elsewhere in the country.

Before 1972, the Government of Quebec was not very concerned with the administration of justice among Native people. Cases involving Native individuals were heard by the ordinary court where the court were sitting. This was also true for these cases originating from the northern part of the province, north of the 50th parallel. These cases were heard in Montreal, Quebec City, or Sept-Iles.

The first time the Department of Justice was made fully aware of the problems encountered by its northern Native population was probably as a result of a case, *Regina* v. *Ittoshat*, 10 C.R.N.S. 385. Defendant Ittoshat of Inuit descent had been arrested and brought down to Montreal 1000 miles from his home on Great Whale River on a charge of causing a disturbance. In the judgment rendered on January 14, 1970 by Judge Malouf of the Quebec session of the peace, "Under these circumstances, how can a defendant exercise the rights granted to him by the *Criminal Code*; namely, the right to call

and interrogate witnesses and the right to make full answer in defence. Such procedure amounts to harsh and unfair treatment, and is tantamount to a denial of justice." The judge was saying that it would be unfair to the defendant and contrary to our concept of fair play to allow this process to continue. "Consequently, I grant the motion to stay proceedings, and hereby order that these proceedings be stayed."

Immediately after that, there was a report called the "Administration of Justice Beyond the 50th Parallel." The main recommendation was the establishment of a circuit court whose duty was to bring justice to each community, so that a Native would no longer be required to move out of his environment to stand trial in Montreal or Quebec City.

When I was named judge of the Provincial Court in 1974, I began to organize this circuit court and we first began to visit regularly the villages situated on the James Bay/Hudson Bay laterals, then the Ungava Bay villages, and recently the Cree villages situated inland.

We must not forget that in the meantime the James Bay Agreement was being negotiated and finally signed on November 11, 1975. This agreement repeated, in a more extensive way, the recommendation of the report I have mentioned.

From the experience we now have we may conclude that in signing the James Bay Agreement, the Inuit and Cree peoples signified their formal acceptance of the Canadian and Quebecois justice system. However, we must also conclude from our experience that this system does not correspond to the mentality of Native people.

Our system is very complex and Native people often have difficulty understanding the logic of our judicial system and its laws. When a person pleads "not guilty," for us this means that we want the prosecution to prove beyond reasonable doubt that the crime has been committed, or that the accused person wants more time to make a final decision as to the plea to offer. But for a Native person to plead "not guilty" is often synonymous with telling a lie. Natives admit easily their crime; they are honest and frank.

There is too much legality in our system. As an example, may I refer you to an actual experience in our Cree villages in the James Bay area. For two years, the lawyers have been discussing before the judge if a curfew by-law enacted by the band council to prevent vandalism, breaking and entering and other crimes committed by kids below 16 years old, usually after 9:00 p.m., is illegal. There are more than 50 cases pending in this village. While the lawyers are discussing legalities, the local constables are losing their authority because they cannot enforce the by-law. Are we helping this community by discussing - with piles of documents and arguments -

the constitutionality of this by-law or if this by-law is against the Charter of Rights? What are we doing with the right of this community to try to face and control its social problems? Aren't we a social nuisance to this community? What are we doing there?

Generally speaking, the Native population is not satisfied with the way we are administering justice in their community, and more and more I am not; and the judges are not satisfied with the work they are doing in the north because they feel there is no consequence to the work they are doing. The "fly-in fly-out" system, which we find in every part of Canada, is suspect and is losing more and more of its credibility with Natives. Generally, court delays and the length of time required to settle a problem is not understood. Natives would like the problems to be settled more promptly.

Also, many problems cannot be dealt with by the system. Possession of drugs or narcotics is a criminal matter, but sniffing glue, gas or other intoxicants is not. For some communities, however, it is more serious and harmful than theft or breaking and entering.

Confronted with this dissatisfaction of Native people towards our system and the increasing criminality among adults and juveniles, the people involved in the delivery of justice in northern communities have to make new proposals. One solution is a proposal made by the judges on February 9, 1985, called "Proposal for a More Active Participation of Native People in the Administration of Justice". The model we proposed is similar to the alternative measures found in the *Young Offenders Act*. The system would be administered by a justice committee composed of elders, women, young persons, or others and appointed by the members of the community. These committees would have jurisdiction over a wide range of offences dealt with by the circuit court. This jurisdiction would be significantly greater than that which is exercised by Native Justices of the Peace. The jurisdiction would, however, be conditional upon the consent of the accused - and an admission of responsibility for the offence - and of the Crown prosecutor. In these respects, the proposal bears many of the hallmarks of a diversion program, although it would significantly extend the useful definition of "diversional" offences. Under this proposal, the justice committees would be able to develop their own procedures and be innovative as to the kinds of dispositions they might make in order to take into account the customs and social values prevailing in the communities.

From discussion with all those who have collaborated to come up with this proposal, I realize how it is difficult for us, people with legal background, to cede to others some control over their own affairs. I can give you some examples. In our discussion, everybody wanted to control the nomination of the choice of the members

instead of leaving it to the band council or the community council. Another example involves the decision to refer a case to the justice committee. Crown attorneys are very fond of their authority and they don't want to give it up to others. A third example concerns the difficulty we have in accepting the absence of legally trained persons in the decision-making process within the committee, when very often all that is needed to give a good decision is good sense.

I think that our behaviour shows our lack of confidence in the ability of Native people to look after their own affairs. Nevertheless, may I say that the policy of the Department of Justice of the Province of Quebec is to give back to the Native communities as much control as possible over their judicial affairs within the Quebecois law system. Over a period of five years, we hope that much of this objective will be achieved. Some amendments to our laws, federal or provincial, may be required eventually to improve the social control of Natives over their communities.

I would now like to give you my personal views on these issues and some guidelines. My personal view is that, immediately and without amending any law, Natives are able themselves to take care of the majority of the crimes committed in their communities if we offer them support and training. Very recently, we succeeded in obtaining funds for support and training, and we will have a lawyer, more personnel, and a person in charge of all our district for the court. An information agent, who will be a lawyer, will give information to all the Native communities, which will then deal with the formation of the training of Justices of the Peace, and so on. Right now, we have succeeded in getting four full time legal aid lawyers attached to the circuit, and - how can you say it in this technocratic language - three and a half probation officers, and two of them are Natives.

So I foresee a system in which we could find, in each community, a group of people devoted to the administration of justice which I would call "The Local Judiciary Authority". This local judiciary authority would be composed of at least five persons chosen by the community and some of these persons would be appointed Justice of the Peace. This system would be very flexible.

I think we have a lot to learn from the experience in Denmark and Greenland with their local district courts where three laymen in every village act as judges with full jurisdiction over everything. There should be no lawyers appearing before these local judiciary authorities except under exceptional circumstances. Court workers would be asked to act as counselors to people appearing before these local judiciary authorities. The legal jurisdiction of the committee could be, from time to time, revised according to their will, training, experience and other factors. This jurisdiction could be annulled by a

by-law, municipal regulation, provincial summary conviction legislation, and also Section 24 of the *Criminal Code*. At first they could hear only a plea of guilt or innocence and eventually hear trials and preliminary hearings. The local authority could always transfer the cases they feel they cannot or do not want to hear to the ordinary court. So the burden of taking decisions against one's own peers would be supported by a group and not only by one person. This way would correct most of the disadvantages of the Justice of the Peace system existing in some provinces and in the territories. The decision would be taken by a group, and the Justices of the Peace would be there, in fact, only to legalize the decision of the whole group according to our laws. The member of this local judiciary authority would also receive training in mediation and conciliation, and would always decide themselves if a case submitted to them could be settled or not. A list of indictable offences could also be considered to be submitted to the local authority for mediation and conciliation.

In the report we made, we identified 52 different crimes, many of them indictable offences, which this local authority could deal with. I'll give you an example. Let's say that in Povungnituk, a 20-year-old man breaks and enters the Hudson Bay store to steal ten bottles of catsup to make home brew. This is a case we have had before. Why should I fly 1000 miles to settle this? Local people settle this problem in their community. They don't need a judge or a lawyer to settle that. Why always stick to that Code and those rules we have made?

The local judiciary authority would be in a position to come up with solutions more adapted to Native values. I think some research should be done at the same time to find out what the Native values and the traditional law are.

I look forward to the day when Quebec judges travelling in the North will be exchanging ideas and ways of dealing with Native local judiciary authority and acting as coach on legal issues. These days no one's further from another person than his telephone or his telecopier. Some may say that such a system is too close to the White system and not taking into consideration the Native values, but I do not think that we should start from scratch. An adaptation should work on both sides.

What is important is not the system we adopt, but that the Native communities regain the social control they have lost because of the changes they have suffered since the coming of Europeans in America.

There is a vast consultation going on now among the Cree people in my area in all their communities and we are expecting to receive their proposal next month. Also we have obtained the necessary government funds to immediately implement three or four pilot

projects involving local judicial authorities or justice committees in the communities that will be able to implement this. Depending on the success of this experiment, we hope that the Native communities will take in their hands a great part of the administration of justice throughout the province of Quebec. The Department of Justice is actually preparing an intervention program in all Native communities of Quebec, and may I say that in the Province of Quebec there are ten different nations, found in 53 different communities, totaling approximately 45,000 people.

I would like to conclude this address by giving some guidelines or principles we should bear in mind when trying to find new ways of delivering justice in Native communities and towards individuals living in the cities. These principles may appear evident, but I think they are too often forgotten.

First, the laws or system of laws of a group or society reflects the values of this society and these values usually ensure the social control over the individual living in this community.

Second, our rural Canadian system is not necessarily the one most adaptable to the different Native communities.

Third, we should be prepared to depart from too rigid principles, mainly in sentencing, and accept that some values may be different for different peoples. You're certainly aware of the *Nagitarvik* case in the Northwest Territory where a judge tried to cope with Native values and his decision was rejected by the Court of Appeal by judges who have never travelled in the North. I think they should have gone there before rendering their judgment.; it would have been a better judgment in the end.

Fourth, we should always be careful that the persons involved in the delivery of justice in Native communities be well aware of the usages, customs, and history of Natives so they can better understand their ways of doing and thinking, and also understand all the frustration they have gone through during the years. Since 1983 the Quebec Provincial Police have organized for the members working in or near Native communities what is called a sensitization course on Native usages and custom. So far 750 agents have taken these courses. A new series of courses will begin in 1989. Agents working in Northern Quebec have to take a one-week course given each year, and may I add that some Natives are participating in these courses to give their point of view and dialogue with the agents. When an Indian guy comes to White cops and says, "You goddamn White officer or cops," I think it's a good thing that the officers know the background of all the frustration that this guy has suffered, and probably this will help the officers understand what's going on when things like that are said.

May I say that within our own district, we have obtained funding

so that any person working in Northern communities will also have to go through a course like that in order to understand the history, usages and the customs of Native people.

Finally, may I say that those who have to work with Natives should care and be dedicated to what they are doing. I think that our Native brothers and sisters are very sensible and sensitive to this aspect of our behaviour and can easily detect if we are honest and sincere in dealing with them.

Chief Joe Norton

I will try to complement what the previous speakers have said, and perhaps give another point of view in some areas. There are many aboriginal people across this country and in North America. We see ourselves as North American by birth, by history, by culture, in every sense, and not just simply Canadian or Quebecois, or Ontarian or Maritimer or whatever region or area we come from.

I think we have to look at how the relationship of our ancestors and your ancestors was developed.

There are various things that took place - treaties that pre-date Confederation, both recorded and un-recorded - that have created a co-existing relationship. That's a very important word in this day and age - co-existence - alongside of Canadian society. That's another important word because there are many people, many First Nations across this country, who do not say 'within the framework' but 'alongside of' or 'with.' It's important for us to understand that there are people who talk about nationhood and sovereignty, not necessarily saying that they practice it today, but saying that they have never given that up. The boundaries - American, provincial, constituency, municipal - put up by Europeans have no meaning for us, if you look at it in the historical context, in the traditional sense, and the customary understanding. That's why you have situations right across this country where people have subsisted from hunting, fishing and trapping, and wish to continue to do so. They don't understand how and why they are breaking laws. How could I possibly break a law when I'm simply trying to make a living the way my ancestors have always done? When you talk to them about breaking laws, they'll look at you and they'll say, "Yeah, people who rob banks, people who kill, people who rape, people who sell drugs - those are crimes." But to simply live and exist as one has traditionally lived, and as one's ancestors have traditionally lived, is not a crime. To believe that one is independent and can raise a family through that type of subsistence, through that type of economy, is not a crime. There are no barriers and there are no boundaries, except those that are imposed on by others. Maybe for us, the Mohawks of Kahnawake, those things are no longer tangible because of

occupation, because of use of land, because of pollution and destruction of our traditional territories. But there are others across the continent who believe in that very dearly, and that's the very, very essence of their lives. Nothing else matters to them. And that's all they look at and all they care about.

Look at the situation in Labrador with the Inuit. What do you think they're fighting about? Why do you think they're trying to stop the low level flying from taking place? What is it doing to them, to their economy and to the very laws of nature. That's what they're dealing with. And yet they have the whole government of Canada against them. I'm using that as an example, because it's very important to understand what we're dealing with. They are being arrested. They are being put in jail, and they're being told that it's wrong. "You cannot stop us." That's the mentality.

But there's another side to this issue too: the territorial integrity of our peoples. From the earth and from the land comes our strength, our spiritualism, our beliefs, our Governments, everything. In each one of our nations, right across this country and across North America, we all have a story of our birth - where we came from, who we are, and what we are, and why we're placed here, the kind of governments that we had, the kind of structures that we had, and some of us still have to this day - and that's all tied to territorial integrity. Take away the territory, you take away our integrity. You limit our traditional capacity to prevent the problems that we're having today. We didn't invent alcohol, we didn't invent drugs, we didn't invent crime. Our peoples had respect for one another. Respect comes out of traditions, out of culture. Through our systems, through our families, our extended families, we had clans. We had setups in which preventive measures were always taken from the time a child was born to the time it became mature, took a spouse, had their own family. There was no need for police. There was no need for jails. There was no need for judges. There was no need for that stuff. Because there was a code, and the laws were very simple, because they were based on nature. And there was respect.

Today, unfortunately, because of the disruption of our lives, of our traditions, our customs, since the arrival of Europeans, we now have to deal with something that is foreign to us. And people wonder, "What the hell is the matter with these Native people? Why can't they understand? Why can't they grasp what we're trying to give them that's so good?" Yet I've heard criticism up and down ever since I can remember about the system out there. About how terrible it is, how archaic it is, how it needs to be amended, how it needs to be changed, how it must meet the needs of the people, and not just to feed on itself. And that's the system they want to impose on us. That's the system we're forced to accept. When we turn around and

we look at our history, at our culture, at our traditions and our customs, it's all there for us. Yet when we try to practice it, immediately we're told that we're wrong. Some system out there, whether its a provincial or federal system, says no, we can't recognize that. Maybe we can recognize it if we rubber stamp it, and if you recognize that certain components of our law need to be reflected in your law.

It's true. There's no confidence that we Native people can be trusted to develop our own system. Look at your own system. Is it any better? Has it developed to a stage anywhere in the world where it's the greatest? Is there such a thing as equality? Is there such a thing as democracy? Is everybody truly represented, and I'm talking both in the political as well as the legal field. Look at Canada. As sophisticated as you think you are, you're actually in the infant stages, because we're talking about moral human issues rather than political and legal technicalities. We're talking about moral issues. We're talking about a human approach.

In our community, we have about 5000 people, and there is a great deal of turmoil, because that community is going through a very fast, radical change. We've been branded smugglers, we've been branded criminals. According to the RCMP, our community is supposed to be an armed encampment of wild people ready to shoot to kill. Wanted posters have been distributed across Canada showing good upstanding Mohawk men and women who are considered armed and dangerous, approach with caution, violent. To me that's a license for any police officer across this country to kill them for any given reason, and it's justifiable. I'm not over-reacting; this is true.

I'm not here to plead on behalf of our community, but I'm here to point out the other side of the coin. There is this type of ongoing racism not just here in Nova Scotia, but right across the country.

There have been inroads, and there will continue to be inroads. There will be growth as far as understanding about the relationship between the First Nations of this country, and the non-Indians in this country, and the judiciary system and the political systems. But in the meantime, we will fall between the cracks in these kinds of situations. There will be more Donald Marshalls, more J.J. Harpers, because there's no way we can get away from that. That's the gloomy side of the situation. But that's the real situation.

The system in the United States is no better. You have Leonard Peltier who's in jail with no concrete evidence of the supposed horrendous crime that he committed. This country cooperated in sending him back to the United States, knowing full well that the evidence presented was not sufficient, was not true.

Yet there are criminals who come here from the United States, who are fighting like hell to avoid extradition, and this country is

defending them. In one way or another the laws are being used to allow them to stay in this country. These are Whites.

I can't understand what goes on. Or maybe I could. I don't mean to take a shot at society in general, but somebody has to say something about those kinds of things that are going on. You are the dominant society because you are more in number. Not more understanding, not more sophisticated, not smarter than us, just dominant in numbers, and you have the power, you have the money. Until all your institutions begin to reflect the type of relationship that was established many centuries ago between our ancestors, we are going to continue on with the same problems that we have.

My father once told me, "For as long as there are going to be people such as you, who think and feel as you do, and people on the other side who think and feel as they do, then you'll always have problems." He says, "And that seems to be what our lot will be." I'm hoping he's wrong. I'm hoping for your children and for our children that he was wrong in that statement. Because that's a terrible legacy to leave for our future generations.

We are in a time right now where there are many different volatile situations that could erupt both in Canada and the United States. All the authorities involved can look at those situations as being a threat to the security of Canada. But damn it, this is our country too. Maybe even more so than the visitors to our territory. People have to understand that. We went through a whole process recently of the First Ministers Conference, the constitutional discussions. We went through all of that. People have to go through that to understand what we're up against. We reached a point where all of a sudden, an agreement was made amongst the provinces - Meech Lake. Where does that leave the aboriginal people of this country? What those First Ministers couldn't attain at our table, they attained at their own table themselves. We were talking at that table about the rights of everybody in this country, aboriginal and non-aboriginal. That's what was at stake, and that's still what's at stake, and make no mistake about it.

When we talk about how to improve the criminal justice system and the band-aid approaches, in some instances, that are being offered, you've got to look at where we came from, where we are today, and where we're going to be in the future. That's what you've got to look at. There are many so-called experts across this country, who only want to deal with what happened after 1867, and I've knocked heads with those people, and explained to them that you've got to look at the historical context. You've got to look at where you came from, and what your rights are here.

Basically Native people know what their rights are. They really do, and they translate it in so many different ways. The person above

the 50th parallel who only wants to hunt, fish and trap, and live by those means, doesn't have to worry about the same worries that I have in an urban city. In the community that I come from we have to deal with over 100,000 non-Native people passing through our community every day. We have to police that. We have to develop our own laws in those areas. And we've done that, and yet we run into a Department of Indian Affairs that says, "Well, we're not prepared to allow you or to give you that authority, or we don't have programs in place. We're not that far advanced in our policies and our guidelines. The constitution prevents us. Or we don't want to step on provincial toes. Or we don't want to step on municipal toes. That is beyond our capacity." And we say, "Bull." We say bull, and we take the initiative. And there are a lot of different communities and nations across this country who are doing those things. They take the initiative, and they are considered wrong. The answers lie with us, and they're inside of us. But they need to come out some way, somehow, and many times they have, but are you listening? Do you understand? Or do you immediately run behind all your laws, and start looking in there, and saying, "Well, geez, you can't do that under section whatever."

We need free-thinking people. We need people who are willing to go and take the risks of expressing themselves like the Canadian Bar Association did. We need people to get out there and start talking about those things. We need to create the basis and the framework for people to begin to realize that this is a serious matter. It's not something that's relegated to a ministry of the Government of Canada.

We are alive, we are here, and we are well. And a lot of us are still thinking and feeling and practicing what our forefathers and our ancestors have done, have instilled in us, and given to us. I'm not a relic. My culture, my language, my traditions, are not frozen in time. If they were, then I wouldn't talk the way I talk, I wouldn't feel the way I feel. Maybe that doesn't answer how to set up a police system or how to develop a judicial system or how to deal with Native people in the courts, but it begins and it sets the basis for understanding. There's such diversity across this country that you cannot impose a system that is a blanket policy even from community to community. That's why I am in agreement with the recommendations that have been made here about developing committees, justice committees, and looking at how these communities function, what their interests are, and allowing them to develop their own justice systems - as simple as they be, as general as they may be, as informal as they may be. They are not complicated, and no one can come in there and start punching all kinds of holes in our systems, if they understand our systems. That's

not like the system that's out there now, where you can have a hundred and one interpretations from different lawyers and whatever else, as to what the law means.

We've done a lot in our community, in establishing criminal justice, to a certain degree traditional justice, but now we're at a point where we've got to expand. People say it's not enough, and we've got to go beyond what's there now. One of the things that we're looking at is preventative counselling. Starting with the young people and working our way up right to the elders.

The only reason why I would accept a policing unit in our community is because we have non-Indians coming through our community, and they have to be dealt with. I don't see why we need police for our own people. Why should our officers have to carry guns for our own people? There's no need for that. Actually, I'd like to see police disappear one of these days from our communities. Why do we need them? We never needed them in the past. That would be the ultimate goal, to do away with policing in our communities.

Some may be saying, well, the Native people want to take over. That goes to the root of the matter about our responsibilities in our own communities, about how we deal with each other, how we raise our families, what kind of values do we have, and I say that to the Native people more than to the non-Indian. We need to get back to those basics, so that we prevent the crime before it happens and not deal with it after. We prevent the alcoholism, we prevent the drug abuse, we prevent the child abuse, so that we don't have to have child welfare situations, so that we don't have provincial authorities coming in and seizing our children. That's the best system that you can find anywhere. Where you don't have to run around looking for all kinds of monies to set up these institutions to solve problems that are caused by somebody else.

Think about it, look back historically, and then bring it forward again to today's situation. Why are we in that situation? Because somebody else brought those things here. We did not have that within our traditional customary systems before. Right now we're trying to catch and we're trying to stop, as much as possible, these things from happening to us. So we do need these various services and institutions, there's no question about it. But what we do not need is to perpetuate them and create a dependence on these institutions. In our community and other communities I've seen it. They say, "Geez, you know, we got social service, we got drug and alcohol programs, dump it on them. Send them to the treatment centre. I can't handle him any more, he's only 14, but he's out of my hands." That is not our way. That's only happened in a very, very short time period, because I grew up in a very loving atmosphere,

and we never did those kinds of things that are happening today. So we as Native people also have to look at ourselves and what we are doing. We have to stop pointing the fingers too and saying it's everybody else's fault. Because we're at the root of the problem too, and we have to take the initiative to start changing the things around that are problems.

It is necessary to look at the historical, spiritual, cultural reasons why we have these problems. Maybe I didn't touch on exactly what some of you were hoping to hear, but I think the causes are what we have to look at in order for us to get a general understanding of how we can take the causes of our problems and translate them into how we deal with them today.

Russel Barsh

We're talking about conflict of norms and culture, and I think it deserves to be repeated if it hasn't been said explicitly already that nothing is as frightening, or as emotionally or culturally charged, or as much an expression of the character and culture of the state, than a criminal prosecution. It's the most significant form of intrusion into private life that anyone experiences, and it really tells you who's in charge when you're in a courtroom on trial for your freedom or your life.

The idea of decentralized, or plural legal systems has emerged in a number of the statements that have been made this morning, and I would like to briefly address that, from three points of view: the Anglo-Saxon legal system's traditions; the experience of the United States with a plural legal system, in which tribal courts have been functioning in one form or another for nearly 100 years; and finally some evolving standards and proposals in the United Nations system as a result of discussions in which Canada and the United States and many other countries have taken part in the last few years.

Plural legal systems have very respectable Anglo-Saxon legal roots. The Anglo-Saxon legal system, the common law system, in fact, evolved from a highly decentralized, highly pluralistic system, which had such things as baronial courts, fair courts, various kinds of canon law courts, municipal corporation courts, the City of London. Purely business corporations also had their own courts. The Virginia Company, when it settled people in what is now the state of Virginia in the United States started out with corporate company courts. There was even, for example, a Jewish exchequer which handled cases among Jewish merchants according to Talmudic Law and was recognized by the English legal system in the Middle Ages and early Renaissance. This was also reflected in the preservation of the system of local juries well into the early 18th and 19th centuries, even after the system of formal administration of justice had centered

in London and judges no longer travelled, visiting on circuit, all the different towns, shires and villages in the country. Judgment was taken in London but the jury was selected locally and there was this process, of sending the judgment out to a local jury. The sheriff would impanel a jury of people who lived right in the area where the offence had happened. They took the final decision on what the facts had been and what should be done with the offender, and that was recorded and taken care of. That was well into the period of the Industrial Revolution.

Centralized adjudication, in what I might refer to as our own mainstream legal tradition is relatively modern. It's a creature of the last 150 years and it reflects not only the blending of European cultures and local cultures within European states, within the British Isles, within North America, but also, very importantly, the assertion of central state power over property and economic relations, and a reconception of law as a system of maintaining formal order, as opposed to a system of simply resolving disputes, and dealing with the different forms of cultures and property in different parts of the country.

But there are, of course, also holdovers of this. We have a dual system in respect of the special treatment of Quebec and Quebecois law in Canada, under the Constitution. There is a parallel arrangement in the United States with Louisiana, which also has a civil law system. In the United Kingdom Scots Law is still a recognized legal system, and I think that we might validly observe that the differences between Scots Law and English Law in respect of the development of law in Quebec and the development of the common law in the other provinces of Canada, are not that far apart compared to the gulf that often separates conceptions of justice and appropriate intervention in problems between Native communities and non-Native communities.

In the United States, there has been a century of evolution of different forms of local jurisdiction and adjudication in Indian communities. Separate legal systems were contemplated in most treaties made with Indian tribes in the States in the form of extradition arrangements, which presumed that only certain people would be extradited and others would be handled locally. Similar provisions, I should note, are found in the 1752 treaty between the Micmac Grand Council and the United Kingdom.

In the 1880s the federal courts in the United States basically recognized and entrenched two rules: one was that in the first instance, Indian communities should handle their own offenders by themselves, under their own laws and that, only if that failed, should an offender be extradited or removed from the community and dealt with according to Anglo-American Law. The second principle was

that in that case, the individual should be subject to federal prosecution under federal norms and procedures, rather than state norms or procedures, because it was viewed that the states were too close to the frontier, to the conflict over land and resources, and were less likely to be fair to Native people than the national courts. Those became entrenched principles a century ago.

Now what that led to was a gradual formalization of procedures, first, by the appointment of judges and Indian police in the 1880s, then in the 1930s, tribal constitutions under the *Indian Reorganization Act*, part of the American New Deal program, specifically reserved judicial power to tribal governments. Funding for modernizing tribal courts by developing facilities, police training and codification of law, became available in the late '60s and early to mid '70s.

That, in turn, triggered both a tremendous Anglo-Americanization of tribal courts, and a reaction in Indian communities to seize more community control and make the courts more Indian, more indigenous. That lead to things like the formation of tribal bar associations, tribal judges' associations, institutes and programs for the development of 'Indian' Indian law, not federal Indian law but Indians' own law, and a return in the last few years in a number of tribal courts systems to models of mediation, conciliation or so called 'peacemaker' systems, based on Six Nation's models.

If one looks at this long century, the trend has really been first, a kind of a colonial effort to establish judicial systems in Indian communities as a way of gradually introducing them to European systems of law, but leaving it in their own terms. Then tribes gradually began taking over these systems, formalizing and modernizing them, and now in the '80s, they are trying to make them 'Indian' again.

I should note that under the current regime, the only real limitations on tribal jurisdiction are a provision in the *Indian Civil Rights Act* for federal review in the case of someone held in custody in violation of constitutional principles of fair adjudication and the optional removal of some serious kinds of criminal cases to federal courts.

We've also had a strange kind of indecisive evolution in the last ten years where the conception of the nature of tribal jurisdiction has been evolving from essentially a territorial one - everyone within the boundaries of an incorporated or chartered Indian community - to more of a personal jurisdiction notion where the federal courts have now told U.S. Indian tribal courts they don't have jurisdiction over non-Indians who pass through their communities. That, frankly, has been a monster. It's resulted in increased non-Indian crime on reservations, and at the same time, some legislative efforts to extend

at least optional tribal jurisdiction off-reservation to urban Indian communities, in cooperation with state courts, so that certain kinds of sensitive cases involving children, for example could be transferred back to Indian courts on the reservation as a way of the community extending positive efforts and control to families that were temporarily living away.

If you had to sum up the positive and negative side of all of this, I think the balance sheet would look something like this. This is from my own experience over about 20 years with 15 or 20 of the 150 tribal courts systems which are now independently operating in the States. On the good side, it's clear that it has made adjudication more accessible, more informal, more understandable. There's been more linguistic flexibility. A number of court systems routinely are working bilingually. Judges tend to be, in the best of these systems, far more sensitive to, familiar with, and responsive to this community situation and cultural standards of what is just, and in the best cases, they tend to be highly mediatory and conciliatory. People go away feeling better instead of just being mad at the judge and the result. Community confidence and support, in the best tribal court systems, has been buoyed. And in some systems, there has been the positive development of a common law system of standards in fields like property and tort, which are totally independent, which are new, which work, which people think are fair, and which have evolved as new systems of common law that are appropriate to the economic and social relations in that community.

On the bad side, there's been a lot of federal meddling with the development of this system, a lot of residual colonialism, and restrictions tied to federal funding and administrative approval of arrangements at the community level. There's been a lot of uncritical imitation of non-Indian courts' formality and, in some tribal courts, unfortunately, a lot of stress on applying rules rather than restoring order and cooperation in the community, importing what I think is a bad idea of law. There has been some slavish copying of state codes of law, leading to a lot of valueless duplication of existing rules and a lot of rigidity. Bringing in non-Indian or outside judges in some systems, on the argument that they're more objective, has also been a problem. Some tribal courts have experienced tribal council manipulation of judges, political influence, and there have been complaints in many tribal court systems about lack of adequate human rights safeguards. There's also been a lack of adequate independent systems for appeal, monitoring and review.

One has to look out for these things. But these are technical questions. These are questions of design of the system. The basic idea of having a plural legal system certainly is well entrenched in the United States at this point. Tribes would fight bitterly against any

effort to divest them of the opportunity to have their own legal systems. And while we continue to fight over the best design and the jurisdictional arrangements with the federal and state governments, the concept that there are three legal systems in the Unites States is, from the tribes' point of view, an absolutely fundamental one at this point and a good one.

Now, briefly, what's happening internationally? The United States and Canada are not the only places where these topics are being discussed. There's growing interest all over. For example, Greenland is now in a process of completing a transition of home rule, of autonomy, from Denmark, and has its own Inuit Judicial System which is highly customary and, from all accounts, highly effective.

In northern Norway and Sweden, efforts are being made now to establish Samme Parliaments, which would produce Samme codes for relations among Samme people and presumably have a justice system in the north of Scandinavia to enforce those codes.

Australia is currently conducting a Royal Commission on aboriginal deaths in custody, which I predict will have a similar effect on Australian thinking as this inquiry does on thinking in the Maritimes, perhaps in Canada as a whole.

There has been an experiment for a number of years in the Northern Territory of Australia on a separate court system for the Yirrkala people that seems to work. It's highly informal and highly customary. When they're asked to explain what the rules are, the rules are things like, 'people shouldn't be bad to each other,' but it works, because it's a system of resolving disputes in a manner the community regards as fair and final.

New Zealand is looking at what they call a partnership model with the Maori people that would probably lead to a formalization of jurisdiction in the tribes over a wide range of internal Maori concerns.

And above all, there's been an evolving consensus in the United Nations system about both the importance of recognizing the negative impact of national criminal systems historically on indigenous people and the value of using plural legal systems as a way of addressing them.

Pluralism is gradually gaining recognition as an effective way to ensure justice and public order in indigenous territories while respecting their right to a degree of cultural and linguistic freedom. It's the recognition of a virtually universal problem: that assimilation into an alien criminal justice system simply processes indigenous people into the jails, which is a form of intimidation and of control, particularly when the court systems are in the hands of the very communities which are simultaneously competing with indigenous peoples for control of land and other economic resources on a

day-to-day basis.

The standards currently under discussion, to leave you with something to think about, could be summarized as follows. There are two parallel exercises in the United Nations now. One is to draft a convention of the International Labour Organization that would deal with indigenous policy generally and land rights specifically; and the other is a broader policy declaration being prepared by a subcommittee of a subcommittee of the United Nations Commission on Human Rights. The draft ILO convention, as it now stands going into a final stage of negotiation next June, provides that indigenous peoples would have the right to retain their own customs and institutions (subject only to international human rights standards and national charters of rights, if any): "the right to deal with crimes or offences according to their own customary methods," "the right to have their customary laws taken into account in the application of any national laws," and "the right to have their economic, social and cultural characteristics taken account of in sentencing and diversion." The Draft Declaration is much broader, but it's also at a much earlier stage of development and much less reflective of consensus, but it speaks more broadly of autonomy.

To conclude, at the beginning of our morning session, Professor Michael Jackson referred to the problem as one of colonization. That very concept was explicitly recognized in a resolution of the U.N. Economic and Social Council last May. It was the first U.N. resolution referring to the problem of indigenous peoples as one of colonization. If the problem is colonization, the answer, it seems fairly clearly, is empowerment. It's decolonization, but it's not just getting the colonial power out. We have to talk very practically about empowerment, giving communities an opportunity to do things that they see as fair, that satisfy the sense of justice of their own members and that give them a measure of responsibility and also of determination, self-determination, in regard to the maintenance of order and a fair way of life in their own communities. And I think in that respect then, national law - to get back also to Michael's comments about the Micmac Treaty and Belcher's statement - should truly be a hedge of protection around indigenous communities, rather than a sword of oppression, so they can freely develop.

Following the morning sessions, the group then dispersed to five smaller workshops to discuss the ideas raised in the morning session. Reports from these workshops follow.

Thomas R. Berger
Chair

Could I just mention three things that arose in the workshop of which I was a member. One is that Chester Cunningham told me that in the last 20 years in Alberta, the percentage of Indians as inmates in provincial institutions has gone from 58 percent to 28 percent, which, I think, is a tribute to the work that Chester's organization has done.

The second thing I was going to mention that Sam Stevens didn't tell you this morning is that at the Law School at the University of British Columbia, there are 21 Native persons studying law in the first, second and third years. And that, it seems to me, is an example of what can be done. When you consider that ten years ago, I don't suppose there were more than 21 Native lawyers in the whole country, I think that that is a remarkable record.

One other thing that emerged in our working group was that there are tribal courts in Canada already established under the authority of Section 107 of the *Indian Act*. It isn't simply an American phenomenon that has no counterpart in this country.

Workshop 1

Professor Brad Morse
Rapporteur

Although people in our workshop sometimes talked about the justice system as a whole, their real emphasis was on the court system. We had a debate among three basic options:

1. the concept of a separate justice system that would be geared to aboriginal people;
2. the suggestion that what's really necessary is to ensure that aboriginal people are available to intervene in the existing system at appropriate times, such as Native court workers, prison liaison officers, Native parole officers and the like; and
3. the suggestion that there is a need for a major structural change in the existing system.

We had advocates in favour of all three. Some people posed them as exclusive alternatives, while some suggested that there was, in fact, a need to address them simultaneously.

Regarding the aboriginal court system, some of the strong advocates pointed out that they felt this was the only truly meaningful way for aboriginal people to gain control over the justice system and that this was the only way to reflect Micmac treaty rights as the means to support traditional Micmac laws and ways. This would not only be a means to ensure that the justice system is

responsive to community needs but also within the general drive towards self-government negotiations.

However, some suggested that this was politically not "sellable". Others suggested that the common law system was the best one in the world, if - and I stress, if - it is truly impartial in terms of its investigatory roles, its prosecutorial function, and in the trial function itself. The complaint was that this is not the case in this province or elsewhere in Canada. Aboriginal people and visible minorities, in general, feel they are getting shafted by the system and that it's neither responsive to their needs nor representative of them. These people suggested the common law system was workable and was a good system in theory - and perhaps worked very well in some jurisdictions - but that it was seriously flawed here.

Another complaint about the separate court system was that it simply would not work outside of aboriginal territories. We had a lot of debate about the possibility for reserve-based courts to have any jurisdiction over aboriginal offenders who committed their crimes outside of the boundaries of that reserve or where the victims were not aboriginal. Some suggested that it would work but that we had to spend a lot of time and attention delineating the boundaries between a separate justice system and the aboriginal justice system.

One of the participants talked about the proposal from the Union of Nova Scotia Indians to this Commission about how to draw those precise boundaries and what role the aboriginal courts could play in relation to offences that occurred outside of the reserve with non-Micmac victims. There would still be a role for the court to play, not as the trier of the charge, but rather more as an adjudicator as to the adequate evidence to warrant a trial, that all the evidence was coming forward, and that full investigation had occurred.

On the other side, we heard a proposal that aboriginal people be active participants in the existing justice system. That was generally criticized as being inadequate in that it would unlikely be funded or treated at the same level as similar roles played by current members within the justice system. There was also a suggestion that it simply wouldn't alter the system; it might make it work a little better, but it would not, on its own, lead to the justice system being respected by aboriginal people and seen by them as fair.

The final option suggested was for a major structural change of the existing system. I don't believe we got very far on what those structural changes might be, but some of the advocates for this suggested that what we really needed was a two-pronged approach. Establishing separate aboriginal justice systems made a great deal of sense but those would likely be territorially limited or limited in some ways so that there would still be aboriginal people running through the general system.

The question then was what to do with those processed through the general system - how to make the system more responsive to them. There was some discussion about the necessity for aboriginal people to be actively involved as professionals within the justice system, as police officers, as lawyers, as judges, as members of juries. There was also a suggestion that all people in the justice system need to be sensitized about the different cultural outlooks, the different historical backgrounds, and the different sense of rights and grievances that aboriginal people possess.

In this regard, there was some suggestion that there really are a lot of similarities between the position of aboriginal people and the position of other visible minorities in that they are underrepresented in the justice system, and they too do not find the general system reflective of their needs. There were no Indian people on the jury in the Marshall case, but there were no Black people on the jury either. Therefore both the victim and the accused, it was suggested, were unrepresented. This was a general problem throughout the system as a whole. Until it was changed, it would be unlikely that people could see the system as being their own. But I think the proposal in this regard was suggesting going further than just ensuring that there are Indian lawyers and Indian police officers, Indian Crown counsel, and the like, rather that we had to make a more fundamental change in the system as a whole.

There were also some suggestions about involving community representatives within the decision-making process. At least one individual suggested incorporating lay assessors into judicial decision-making. On the general question of how to make this system more responsive to aboriginal people as a whole, I don't think we came up with a particular conclusion. I think perhaps we ended with a tie between those who were strongly in support of creating a separate justice system as well as seeing a need to structurally change the existing system, and those who felt that merely changing the existing system would be sufficient.

Workshop 2

Carol Montagnes
Rapporteur

We had a very interesting and free-ranging discussion, and the points that were raised by various individuals were sometimes reinforced by others in the group but there was no time to really go around the group and find consensus with regard to specific recommendations.

Some people said Native people should have the authority and control to decide what changes are necessary with regard to the criminal justice system and what programs will work in bringing about those changes. There was a lot of support shown for the

statements made by Professor Sam Stevens in the presentation this morning and for the statements made by Chief Joe Norton, and it was stated that there was indeed that basis in the Constitution for the vision presented by Chief Norton.

It was stated that the question of authority and control was a matter of political will and that will had to be there to make these changes to the system.

There was a comment made that there was a lack of a formal mechanism for provincial and federal governments and aboriginal groups to speak together to address criminal justice issues.

One participant stated there was a need to systematically explore what the nature and scope of the Native community needs are.

Tom Sampson, from the South Island Tribal Council, gave the group an example of an alternative system to the established system, *i.e.*, the use of customary law to solve family problems.

One of the participants made the point that Indian people in violation of the *Lands and Forests Act* are being punished while large corporations, cities and so on are polluting the environment and seemingly getting off scot-free. In the eyes of Indian people, this is not equality of justice.

There were several questions raised in our group. One was about separating the issue of geographic isolation, the issue of socio-economic deprivation, and the issue of aboriginal people to determine where the problems fall. There was also a question raised about Native people in urban centres, as opposed to Native people on-reserve.

There was the suggestion that we must examine the racism that is built right into the system and that assumes that Native people cannot handle their own affairs.

The question was raised about how much cultural education is given to law students and to lawyers so they are aware of the cultures of other peoples; funds are required to do this.

There's little need for further documentation that there are problems within the criminal justice system; what we need to do is to make changes and in order to make those changes we have to recognize that Native people can indeed address these problems. Once that recognition is given, the 'how' of doing this is a question of design.

A concern was expressed about how the good recommendations that are being made to the Commission can be sustained and addressed after it is over. The point was raised that we continually apply to Native peoples' aspirations standards that we don't apply to our own aspirations. The recognition of Quebec as a distinct society was given as an example. And the point was also made that you don't come up with an accommodation or a parallel system of

aboriginal justice without spending a lot of money, without making a major investment.

And we concluded that the important issues were the issue of control and the issue of authority being given to Native people.

Workshop 3

Professor Bruce Archibald
Rapporteur

This workshop started by asking whether or not there was consensus that a parallel system of justice or Native self-government insofar as the justice system is concerned was something we could all agree on. I think at the end there was agreement that Native self-government, and a Native criminal justice system within that, might be an appropriate goal. The difficulty, we found, was how to get there from here. There wasn't agreement on what the content of such a system might be.

There were a range of alternatives put forward from merely having Native administration of existing laws in reserve territories, to a system whereby there would be greater Native determination of the content of how police or people in the system might operate, to a system which would be entirely based on "Native law", if we can use that kind of a term in this context. There was no real agreement, I don't think, on whether we were talking about an adjudicative kind of system or whether we were talking about a system which would be primarily based on mediation and reconciliation, and if it was based on mediation, to what extent these values would have to be sacrificed to Western procedural values.

There were several approaches. There were those who said, "Well, we know what the problem is, and let's just get on with it." And there were others who were saying that we all agree that we know what the problem is but to say let's just get on with it is a difficult proposition.

There were several Native speakers in the group who were very committed to the principle of self-government but were reluctant to jump into the unknown, and were willing to take what I thought to be an incremental approach to achieving Native self-government in the context of criminal justice.

We had a good debate and exchanged a good deal of information, but we didn't come out with any solid recommendations that we can bring forward to the group other than that we're all in agreement that things have to change and that we have a shared sense of the ultimate goal, which involves vastly greater Native government and self-determination in relation to criminal justice. How we get there and at what pace is a question which will involve a lot of wrangling, but it is hoped creative wrangling.

Workshop 4

Graydon Nicholas
Rapporteur

Our group started by having the workshop leader review some of the concerns that were raised this morning by the many speakers, focussing on three areas: first, the plural court system; second, cooperative arrangements; and third, the current personnel and training procedures within existing institutions.

But as the discussion progressed, there were many questions on how tribal courts functioned, what is their authority, what kind of resources are required, how do the police relate with one another and with the non-Indian communities? Is population a factor that has to be considered in order to set up these tribal courts in this area? Russel Barsh attempted to answer many of these concerns, because he was most familiar with the American experience.

From there, we proceeded to deal with changes that should be considered, and the two areas that were brought up were incremental change and radical change. In the incremental approach people said, "Well, you know, some of these recommendations like the ones here today, we've heard these things for the past 15 to 20 years, and nothing has been done, and this leads to frustration, and makes you wonder the purpose of the recommendations and discussion of concepts." Others said, "Well, we should be careful and very cautious in accepting this approach, because even the current system is not good for society in general, let alone for ethnic or minority groups."

And then we focussed on the problem of miscarriages of justice. In the current system, or tribal court systems or traditional systems, we must make sure no miscarriage of justice could take place.

We discussed some of the current things that are taking place across this country. Chief Joe Norton from Kahnawake explained that communities demand that their leaders assume responsibility because many of these problems at the community level don't even deal with what we would call criminal activity. They deal with child welfare and social concerns, with property disputes and family disputes; only in very rare instances of criminal activity would outside police forces or the investigative arm of the criminal system be used to help the tribal police to do their job.

We talked then about what is the role of the dominant society. Does the dominant society take a more direct role having control of the development among the different communities? Are these communities ready and prepared to take that responsibility across this country? And because the needs of the communities across this country vary the solutions must be different. When Indian initiatives have been taken, they have been in the areas of conciliation, reconciliation and restitution as opposed to incarceration or institutionalizing a problem. The question at the community level is

how to get along with one another.

Of the original three areas we were to concentrate on, the first point was changing from pluralism to a community justice system, that is, a system whereby the community would begin to assume and assert its own jurisdiction, and all that the dominant society should do is not resist or undermine this community initiative. In fact, it should be supported. There should be dollars available to make sure that these systems are implemented.

Comments From the Floor

Howard McCurdy, M.P.

There was indeed a good deal of discussion of aboriginal self-government and tribal courts in Workshop 2. I'm not questioning that as a matter of principle, even to the extent of violent crime and murder within the geographic limits of a reserve jurisdiction. But the real question is whether all of this is a diversion. After all, the Donald Marshall case would not have been dealt with in this way. It's really quite inconceivable to me that, politically, you could have a situation where an aboriginal judicial system would be applied to a crime committed off the reserve in Halifax or Toronto or any place else. So I'm inclined to see the discussion as a diversion because it doesn't deal with the faults that led to Donald Marshall's problem - and that is the criminal justice system from top to bottom, and a political system from top to bottom that is not able to cope with members of various minority groups. When we talk about change, surely the change is of the sort that deals with racism - racism in the legal system. By not addressing that in specific terms, we're not only failing Donald Marshall, we're failing every other minority group member who faces a system that is incapable of dealing with such individuals. So I'm saying aboriginal self-government, yes, but the responsibility that minority members are not properly dealt with still resides with the general criminal justice system. It seems to me that we ought to be taking a look at what changes should occur there, more than directing our attention to Native self-government, in dealing with possible solutions in Nova Scotia that would avoid a Donald Marshall case occurring again.

Professor Edward Renner

Professor Morse said that one of the points of view in Workshop 2 was that there was a need for structural or systemic change to address those kinds of issues. I think our point was that most of the comments that we've been making today miss the main point, *i.e.*, the main issue is racism within the criminal justice system from the top to the bottom. If we accept as our premise that racism is the biggest

problem, then we know enough about racism, we know how it operates, we know the consequences of racism; we can begin to deal directly with racism and how it works, to make immediate kinds of changes that have immediate consequences, to begin to reverse how the system scoops up marginal people and gets them into the prison system. That is the central issue and we shouldn't lose sight of that.

Davies Bagambiire

I'm one of those in Workshop 2 that spoke fairly strongly in favour of a Native court system for Natives in Canada. I still believe that there is room within the present system that would enable the creation of traditional courts that could handle minor criminal offences, preliminary investigation into serious offences like murder, robbery, aggravated assault, or a traditional rape, before they are transferred to the superior courts. But I also think that such a position is not necessarily incompatible with revamping or reforming the existing system. In fact, I think the two are complementary.

I think that the creation of a limited court system is indeed complementary to the reformation of the common law criminal judicial system as we understand it. Many minorities in Canada are not Natives and therefore could not be covered by the Native courts if they were to be set up, so creation of a Native court system cannot in any way be an answer for them.

And I think that the Commission may be making somewhat of a mistake if they simply focus on prevention of what happened to Donald Marshall. I think that the Commission has to be a lot broader in addressing the issue of reformation.

Dr. Wilson Head

I want to make a couple of points very quickly. The first is, I think, that we're caught up in the bind of trying to reform the present system without too many changes. I'm very cognizant of the fact that in the United States where I came from, we've added quite a few non-Whites to the criminal justice system, particularly at the level of police and, of course, lawyers. It has not changed the system very much however. I think this Royal Commission gives us another opportunity to bring in some very new ideas which begin to look at the English common law system from the very beginning in terms of its social value and utility.

Some years ago when I was studying criminology, there were some 44,000 laws on the law books in Canada. I believe, for example, very strongly in the concern of Thomas Jefferson in the States who said, "All laws should be sunset laws," that is, they should expire at the end of 25 years, unless they were reactivated because there was a need for them.

The second point I want to make is that the system itself is a part of a totality of systems: the educational system, the employment system, all the rest of them. The criminal justice system does not exist in a vacuum, it's a part of a wider view. And we know that the criminal justice system grabs the poor, the minorities, the uneducated and the young, and they are disproportionally represented in the system. We need to find out why that is so.

Is there a different law for the poor and for the rich? For the minorities and the rich? Most minority groups are poor. They get it in the neck because they are poor. They get it in the neck because they are young. They get it in the neck because they are uneducated. They get it in the neck because they are racial minorities.

That seems to me to mean then that we have to look at the whole system. I invite the Commissioners to look not only at the criminal justice system. We only looked at two aspects of it now. We have not looked at the correctional aspect so far today; we have not looked at the prison system or the parole system, and other such systems. But I think we need to examine all three of them in comparison as part of a total system of social control in a modern industrial society. That is a big job. So I see this as being simply the beginning process that ought to take place over a number of years to try to come up with some real changes that will make law and justice meaningful terms in modern society.

Kevin Christmas

There are federal laws in this country that we have to abide by that are racist. The *Indian Act* is racist. The laws and regulations that govern our daily lives every day are just bound with racism. If the Canadian public had to abide by the rules, regulations, bureaucratic control and foreign authority we have to abide by to survive, I think there would be an armed revolution in this country.

The question that really bothers me was driven home just a couple of days ago when I was watching the twenty-fifth anniversary of John F. Kennedy's assassination in the United States. There's an expression that says, you know, "Everybody remembers what they were doing the day of his assassination." And I remember watching that stuff on television, and there was a lot of talk after the assassination about his civil rights record, and about what John Kennedy did to bring the vote to the South, and everything. And I was asking a gentlemen that was in my house at the time, "What's all this about anyway?" I was only around eight or nine years old at the time. And he told me. He says, "Well," he said, "down in the South, in the United States, the Blacks can't vote. The Blacks can't go into restaurants, they can't go into liquor stores, they can't go into government offices, they can't go in all these places. You know, they

can't go and get welfare. They're given chits and they have a whole system in place, and they don't have any jobs, they can't get work." And I said, "Oh, geez, that sounds like the reserve." And that's exactly true.

It's only 25 years ago that we got the right to vote. It's only 25 years ago that our people were granted the right to go into a liquor store, or to go into a tavern, or to get a hotel room. And many people from Nova Scotia remember those same principles applying to the Black community here, too. There are certain spots in this province where Black people weren't allowed to come into town after a certain time. We grew up with them. We understand racism. We know what it's about.

I guess the thing that bothered me about the suggestion that self-government is a diversion is that what we're talking about is reconciling this whole question of repression with survival. We're trying to survive as a nation. It's taken hundreds and hundreds of years to protect our language and protect our way of life and our own way of dealing with each other. These things didn't come easily. We had every invasion going against us, and we survived. And we're going to survive with or without you. And I think you have to understand that. If it's with you, then we're prepared to work with you, to help you, but don't think you have something to give us. Because what you've given us has been far short of freedom. And I think the liberty that we're trying to articulate and trying to express is something that every human being in this world is trying to express. And this notion that people are superior or have a better system or they're more articulate, or they're better trained, I think that's days gone by. But I'll tell you, we're going to survive.

Thomas R. Berger
Chair

There are a multitude of proposals on the table now for our three besieged Commissioners to consider but may I be permitted to pay a word of tribute to them. Some of you have said that if there is racism in the justice system from top to bottom as some have alleged, the work of this Commission may have done something quite positive to eradicate racism in the system. There's nothing more salutary than opening these things up to the light of day. It may be that just the act of exposing all of these things to the light of day, letting the sun shine in, has had some effect on the attitudes of people in the justice system, and I wouldn't discount that altogether. Sometimes it's good to come up with specific proposals and sometimes they can be made to work. But there is also an aspect of consciousness-raising about Royal Commissions as they are conducted nowadays in this country, and I think that the three Commissioners here have perhaps made a contribution that you can't write down in a statute book anywhere,

but in daily life it may turn out to be important.

Might I just offer one other comment on the very helpful things that have been said just now. If tribal courts were to be thought of as something communities in Nova Scotia or elsewhere wanted to establish with limited or larger jurisdiction, it is quite true that they would not normally have jurisdiction over what happened to Native people off the reserve. But, of course, that's why we had people like Sam Stevens, Michael Jackson and Chester Cunningham here to talk about Native participation in the system generally.

Well, with those thoughts might I just turn to Judge Coutu and see if there's anything he'd like to add before we adjourn.

Concluding Comments from the Speakers

Judge J.C. Coutu

Well, right now I have nothing to add except to thank the Commission for inviting me here. I hope you will have learned something from what I have said. I have learned a lot from what I have heard today. And I thank you very much for that.

Professor Sam Stevens

I do have a couple of comments that I'd like to make particularly to the speakers who spoke on racism. I assumed when I spoke earlier that there was this problem, and that's why I spoke of minimum protections. It's very difficult to eradicate racism within any system. In fact, at the band level, at reserve level, there is bias as well. So it isn't something which is exclusive to the non-aboriginal society. So when I talked earlier about minimum protections, really what I was saying was that in order to ameliorate part of the problem, I think we need to have some minimum protections. It may not, as some of the speakers correctly pointed out, improve the situation but it certainly does provide some protection for aboriginal peoples.

At the present time there is not that protection right across the board. Aboriginal peoples don't always have the option of consulting with an aboriginal lawyer or a court worker or a prison liaison worker which would make them feel as though someone understood and would protect their rights.

Some of you spoke about how an aboriginal court system would resolve the racism problem within our present system. My view is that the evolution of aboriginal peoples was arrested to a certain extent by the evolution of the dominant society's culture, laws and institutions. Along with that, I think, came a loss of respect for their culture, for their aboriginal First Nations. Aboriginal peoples are asking to be able to pick up with their cultures, with their laws, and advance that to the point where they can select some of the good points about the dominant system, select what of their present

aboriginal systems they would like, and come up with a system which works for them. And through that process, I think you will see fewer aboriginal people within your criminal justice system. That just sort of flows from their ability to be able to have more respect for their culture.

Professor Michael Jackson

I just wanted to make a comment regarding the issue of racism. While I think there truly are some common elements between the situation of Blacks and indigenous people, I think there are very important differences. One of them is that only in relation to indigenous peoples is there a provision in the Constitution entrenching distinctive rights in terms of treaties and aboriginal rights. They are the original peoples.

The other thing is that, as I understand it, when we're dealing with racism, it is our state of mind, it is our attitude towards other people. In a sense, it's something for us to correct. And it *is* something for us to correct. There is no question about that. In relation to Native people the issue, however, is not what we have to correct about ourselves; the issue is returning to them their rightful responsibility to govern their own lives, to shape their future, to ensure that their children have an understanding of who they are, where they come from, their distinctive place in North America. It's not something which we, as the dominant society, simply have to do to ourselves to cleanse an evil in our midst in terms of how we have superior assumptions to Native people. We have to go further and return to them the ability to chart their own destiny. And I think it's a different perspective.

In relation to that latter course, one of the things I wanted to leave the Commissioners with is that as the dominant society we have always assumed that our culture, way of life, consciousness, was the future of North America. What you can do as Commissioners is to take cognizance of where that has led us in terms of how we have treated and undermined Native people and how we have taken that wonderful promise of Jonathan Belcher about the hedge and the field of liberty and created, in fact, a prison out of it. We are, in fact, going back to a recognition we once had of Native peoples as being our equals. Many of the suggestions coming to you are ways of perfecting a view of Canada which gives Native people the ability to shape the future of this country in ways which enrich it. And I think the [illegible]mission has an important role in identifying where we have c[illegible]o, as Chief Norton so eloquently described, and also some of the routes we can take, which are not routes we have trodden for a long time but routes which we have to tread again if we are to have a

system which truly treats Native people as our equals and as our contemporaries.

Chief Joe Norton

(Chief Norton began by addressing the Commissioners in the Mohawk language.)

What I said was that there is a general understanding about our relationship. The way I have been taught and the way I understand, is that there are two paths, two realities. One is the aboriginal reality, and the other is the present North American reality. In our path are all our laws, customs and religions and all our understanding of who we are and what we are. In your path, similarly, is everything else. We travel the river of life together. We are joined together, but we are separate. That's a way of expressing how our people felt when they first made agreements or arrangements with your ancestors. That's called a two-row-wampum. It's real. It's alive. Our people still practice that and still believe in that. Our people believe in that concept of sharing and of giving of one's self. In return, we ask that you simply respect what we have given to you, what we have allowed you to partake in. I guess, unfortunately, that gets kind of messed up as time goes on. We now find ourselves in a situation where it's no longer equal, it's no longer sharing. It's ownership. (It's mine. I have it. It belongs to me. And, therefore, I can do what I want with it.) We don't even own land. It's a foreign concept. We can't own it. It's vested in the generations that are to come. It doesn't belong to us. We are caretakers of it. We are caretakers of our languages. We are caretakers of our cultures, of our traditions, of our customs. It doesn't belong to us solely. And we can't destroy it. We cannot disregard it either. We must uphold very strongly what we believe in. And that's where we come into opposition with people who have a different point of view about how they live in North America.

All I am trying to point out is that the situation that Mr. Marshall and others across this country found themselves in, and find themselves in now, is a result of that different point of view. We call it racism. A lot of it is also based on fear of Native people. If we are minorities, as you would term it, if we are so small in number, why do you fear us? Why do you impose these things on us, when you know full well, and when we know full well - or at least we do anyway - that there are these two realities. There are these two roads. And that's our path. And that's your path. Yet we share the land. You have nothing to fear from us. And if we begin to deal with our people in a proper fashion, and our people are comfortable with how they are being dealt with, if they are satisfied that they are being judged by a jury of their peers, if they feel that all the mechanisms are there

that they can turn to in order to make appeals or to do whatever is necessary to take justice to its final stage and settle for what is being done in our communities, then there is nothing wrong with that. I find it hard to understand, maybe because I am naive to think the solution is so simple. But for me it is. It's very straightforward. There is nothing complicated about it. But because of the type of belief you have, because of the kind of law you practice, and the kind of society you have, it's very complicated. What becomes more important is the money, the industries, employment and those kinds of things. Those things become more important than the human factor.

There are three basic things in our lives that we can't survive without: air, water and land. That's what Native people think about all the time: air, water and land. What does that have to do with Donald Marshall? It's very simple. At one time we lived by that. Somebody came in and disrupted all of that and caused our lives to change, caused our ways to be changed. And all of a sudden we get into crime. We get into these other areas that your people are involved in equally also, if not more so than our people. To disrupt a way of life so that people turn to negative things is a crime in itself. So you have to ask who are the criminals in these situations, if there are any criminals.

There has to be a change in thinking, in how we relate to one another, in how we are going to survive, because you have situations right now all over the world with the potential of destruction. Yet, people are talking about building more bombs, building more things that will destroy, instead of looking at replenishing or trying to correct what is natural and what is being disrupted as far as our natural ways of living.

I think my message is very simple, about respect for one another. And that gets lost somewhere along the way.

Chester Cunningham

I don't think the court worker program is the complete answer, but I think it's the beginning. As I look back at the history of the court worker program, one of the things it did was to create awareness, not only within the judicial system, but with the Native people themselves. When I first started to go looking for funding and would go to the press and talk about the large number of Native people who were incarcerated, the Native leaders told me I am calling all the Indians criminals. What I wanted to do was to bring it to the forefront so that we could discuss it and do something about it. I think the court worker program has also sensitized not only the criminal justice system but the Native people. The Cree and most of the Native people I deal with are quite laid back. And they trusted the system. They would say 'Keiam'. And 'keiam' means, "Oh, that's

okay, let it go." And we'd say, "Yeah, your 'keiam' will get you two years." We have to start looking at it. And you can do something. And I think we sensitized them into doing it.

An important result I am seeing is that education and training is being provided, and we now have some role models. I think I have six former employees who are now lawyers, who wouldn't have been if they didn't have the court worker program to introduce them to the criminal justice system. You talk about money being cut off. As long as you are proving to the government that you are saving them money, the money will continue to come.

Russel Barsh

I had a reaction to the information that if we could just stand up and point the finger at the courts and say, "You racists!" that somehow we would have made a tremendous breakthrough. I work with not only indigenous issues here in North America but also on aspects of a United Nations program to combat racism. One of the most fundamental principles of international discussions on the problem of racism in South Africa and elsewhere is that racism is a symptom and a tool of power, and that it can't be eliminated without addressing the question of power. You don't educate it away. There is too much danger that when you try to get everyone to be polite about racism that people just learn to discriminate more subtly. They learn what not to say. They learn when not to say certain things or when not to do certain things. It's too easy for the problem to seem to disappear that way.

Recruitment of people into the existing state institutions can gradually change things, depending upon how it's done. But there is also a tremendous danger - if that's all that's done, just recruitment - that what you do is simply make the visible agents of the existing injustice Brown or Black instead of White. Brown against Brown and Black against Black instead of having it out on who has really got the power.

I have seen in the affirmative action programs in the United States a message to Native people in recruitment into so-called dominant institutions as a path to change that, "Now you can be one of us. If you join our club, then we'll treat you well, with respect, but only if you join our club and wear our uniforms." Now, I am not saying that there isn't a role for public education, for anti-racism campaigns in public information for recruitment into the Bar, into every aspect of the judicial, corrections and police system. But by itself it's too easy for that strategy to create only the appearance of change, and, in fact, to send the wrong message to people. "If you join our system, and we're being very gracious to allow you to, then we'll treat you with respect. But we don't respect you enough to trust you to look after

your own problems or to share power with you in the disposition of what's happening in your own communities." So I would agree emphatically with the earlier speaker who referred to the complementary approaches that we're looking at. Yes, by all means, let's try to humanize and to remove the racism that may be in parts of the criminal justice system. Let's try to make it truly everybody's system. But for Native people at least, I think that there is not going to be much of a change in people's sense of where they stand in relation to the rest of Canadian society unless they are also given power.

2
Blacks and the Criminal Justice System in Nova Scotia

November 25

Burnley "Rocky" Jones

I want to see if I can help the Commissioners understand what it's like to be Black in Nova Scotia, what our history has been and what is happening to us now. I want the Commissioners to understand that we are looking to them for some very strong recommendations to go to this government which exists in a province which historically has not treated us fairly nor allowed us to participate in the mainstream of the economic activity.

I would also like to relate our struggle in the sense that we're involved in a struggle that is common to all of us. I go back to the development of the Red Power Movement, and Natives across the country saying "We need Red Power." I was involved in groups and supportive of groups that supported that movement. I've been involved in groups that support Black power, power for Black people. What we're talking about is a combined protracted struggle for people power, for the power of the people to realize their goals.

Clearly there is a need for coalitions. I speak particularly to the Native community and say we support your struggle. I hope there's a possibility of us having a combined struggle based on the integrity and the power that resides in both of our communities because we have a common oppressor. We are part of this country together. Your history is different than ours. You have different claims than we do. But the reality of it is that the same person who oppresses you oppresses me, and the same institutions that come to bear on you come to bear on me. So as we continue our deliberations I would hope that we would think in terms of that commonality of our struggle.

That kind of commonality led to the development of the Transition Year Program at Dalhousie University. In this province, Blacks and Natives were excluded from the mainstream of the educational system, streamed into programs, not getting through the university. Because of that history, we created a program to attempt to get Black and Native students through the university.

Mahatma Ghandi once stated, "A man cannot see his future until he has first seen his past." Our past and our history in this province is a history of oppression. We have been here since this province was settled by Europeans. There were major waves of Black people who settled this province, and I will just touch on that because I want you, Mr. Commissioners, to understand we just didn't arrive off the boat. The things that we are asking for, the equality that we demand, is due us because we helped build this country.

In 1783 and '84 there was an influx of approximately 30,000 Loyalists from America to Nova Scotia. There were also about 3,200 Black Loyalists who arrived at the same time, and 1,200 slaves. Very few people understand that slavery is part of the Nova Scotian experience. That's our history, and that's the history of the people who also run the province, which may give us an understanding of why we are where we are today.

When the Loyalists arrived in this country the White Loyalists brought with them the racist attitudes that evolved in the slave society from which they were fleeing. What this meant in Nova Scotia was the kind of schizophrenic mentality of Whites which still exists to this day. I'll explain that.

The English under Clinton offered freedom to any rebel-owned slave if the slave could reach the British lines. Clearly many, many, many, many hundreds up into the thousands of Black people deserted the rebels to arrive at the British lines. But this was done for military expedience because the same offer was not open to the slaves who were owned by Loyalists. There were over 3,000 free Blacks and 1,200 slaves getting on the same boat and coming to Nova Scotia. It's just as stupid as this. When a Black man came to the ship leaving the harbour, the White man that was checking it off would be saying, "What's your name, boy?" "Well, I'm Burnley Jones." "Who was your master?" "Jake Jones." "Oh, he was a Loyalist, well, you come on board but you're a slave still". "What's your name, boy?" "Bill Smith" "What was your master's name?" "Jack Smith." "Oh, he was a rebel. You come on board too but you can be free." And that's how ludicrous it was. Upon arrival in Nova Scotia, all of these Black people got off the ship together, and one guy was a slave and one guy was a free man. These people were put to work building the fortifications, building the roads, doing the work the Whites didn't have time to do. Part of what happened at that time that shaped our history, and everyone else's history, was that the Black people who were coming believed that they were going to be treated fairly and equally. The average grant of land that the Blacks received was considerably less than the land that Whites received. Blacks were settled on the outskirts of the major towns: Guysborough County, outside of Halifax, outside of Digby, outside of Shelburne. Then they

came into town on a daily basis to work for the Whites from daylight to dark with no time to build their own homes or clear their own land or do anything but get home at night, crawl back into some sort of shack, for many even a cave, and that's how we existed.

The Black people petitioned the government, "Please, sir, will you give us the land you promised us, will you treat us as you promised us?" Year after year after year after year. They never got the land and they were never treated any differently. So finally, the Blacks went to England and asked the imperial government of England, "Please, sir, will you make them do what you promised would be done?" The English response is very interesting. They set up a commission, and the commission looked at their legitimate claim for land and decided in their wisdom that it was the Black's own fault. The commission decided that because from the time they settled here in 1783 to 1792 when the commission finally sat, a large number of the Blacks had left and gone back to Africa. They just couldn't take it. So the commission said, "Because you decided to live in this particular area, clearly the Black people are at fault and we shall not change the way land grants are given, we won't do anything about it because you're wrong."

I'm hoping this Commission will look at things differently and not end up with the kind of conclusions that say we are at fault because we cannot participate in the mainstream of economic activity, or because we say the system of justice is racist and fails when Blacks are the victim.

As a result of this Loyalist experience, the Black Loyalists and the Black slaves became merged into one group. Nova Scotia as a province could not accommodate slavery, and slavery wasn't feasible, it wasn't practical. We became a source of cheap and readily available labour at a time when the manpower needs of this country were very high. So, in fact, it was sort of a positive experience for Whites in Nova Scotia. They had these Blacks. They only had to hire them as long as they wanted. Then when they were finished with them, they could let them go and they had to fend for themselves. Some of the Blacks were sold back into slavery. Some people were indentured, but they survived.

When the Blacks went back to Africa, it destroyed our communities. The whole community would leave based on the religious affiliation. So if the minister agreed and if his flock agreed, the whole community would just up and leave and go back to Africa. We had places where the entire community was just devastated. The Sierra Leone Company, which organized this exodus for economic reasons, would not accept unwed mothers or people who couldn't produce a letter saying that they were of sound body, good character, etc. So we, as Black people, were left with the people who didn't

have skills, didn't have organizational ability, etc. All of those people were taken away. So in these little communities we had these powerless, uneducated people with all kinds of problems.

Another major influx arrived after the War of 1812 - refugees who, also on the basis of proclamation, fled to the British. These people come into Nova Scotia at a time, again, when it seems that there is prosperity. But we have a mice epidemic and a potato crop harvest failure in 1813, 1814, 1815. So instead of being welcomed with open arms, suddenly these people are competing for very scarce resources, and clearly the response to that in the White community is the rise of White racist attitudes that affect the Black community.

I am arguing that the racism that evolved after the War of 1812 and shaped our community has not gone away. The legacy of that is what we're experiencing now. The two communities that merged - the Black Loyalists and the Black refugees - became one group, and the Whites were also a group; we are the descendants of these same people. There has been no break in that pattern whatsoever.

What was the salvation at that time? The salvation for Blacks was to embrace religion. First it was the Anglicans. The Anglicans, through the Society of the Propagation of the Gospel, friends of the late Dr. Gray, established schools in the Black communities. In these schools Black people were the teachers and preachers. But eventually Whites took over the school system. The leadership of the Black community moved out of the educational system into the religious realm with Black preachers. And the Baptist religion took over all of the Anglican and Methodist churches and the Black church became established as Baptist. The Black Baptist church became established as the dominant church and religion in Nova Scotia for Blacks.

I think the important thing about this is that the Black church, the Baptist church, was the only place where Blacks could exercise any kind of democracy. It was in the church that Blacks found all of the ideals that Whites could find in the larger society. They voted for their deacon board. The deacon board in turn hired the minister and the minister preached on behalf of the flock.

What that leads us to is our process of negotiation. It was the role of the deacons to negotiate on behalf of the Black community. They were the leaders in our community. But they were porters, they were labourers, shoe shine people, chauffeurs. They were very poor people, mostly uneducated. And they were forced to negotiate with our Premiers, the heads of our industry in this province, with their bosses, and on our behalf they made bad deals. But they had no choice. How can you negotiate with your boss from a position of no power? So we have never had any power. And the institutions in this province have kept us powerless.

I want to take just a moment to talk about how the government takes over the Black community. What happens in the Black community through the church is that Blacks are responsible for dispensing patronage within their community. The deacon board would go out and talk to someone and find out there's a job here or there or whatever. They would come back and then they would hand that off to the community. If a person's house got burnt, the community rallied around through the church and the deacon board and the women's auxiliaries. They would help build the person a home. It was also quite common to have what we called pound parties. If a person or family was really destitute, the community would have a pound party and everyone would be expected to bring a pound of something to the home. The community was looking after its own. If there was a dispute in the community, the dispute was handled within the community. Children were looked after by the community and, indeed, the Black community went so far as to set up the Nova Scotia Home for Coloured Children because we had to look after our own children.

But then the government came along. And like the Indian agents, the government had their welfare workers and their social workers. These foreigners were introduced into our communities. The White teachers took over the educational system. The White social workers began to dispense the patronage. Disputes were then handled by the courts. The police were used as the enforcers of the orders of the larger society, and the traditional roles were all destroyed. The deacon board lost their power, the church really lost its power in that sense and we became dependent on the government to such an extent that it's now quite acceptable to live on welfare. Welfare is seen as a legitimate way of life whereas before we had an independent community.

What does all this have to do with criminal justice, you say? Why am I going through all of this to talk about what the Commissioners have got to do?

The relevance of all of this is that given our history and oppression, it's no wonder that the police are able to treat us like they do.

I've been involved for many years in organizing in the Black community. What I want to leave you with is that this racism is intrinsic in our society now. We just can't escape this kind of institutional racism. Yesterday I noticed that people didn't want to use that word, and today for the record, I want to keep using the word because that's exactly what it is. When we look at the police, the prosecutors, the judges, the juries, the coroners, custodial staff - basically they're all White, and basically they all work to support the system which oppresses us.

Let's take a look very quickly at a couple of the cases. Graham Jarvis was a Black man who was killed by a White man in Weymouth Falls. What's interesting about this case is that when this Black man was shot by this White man, he had to crawl to the highway. He bled to death on the highway while this White man watched him, watched him crawl there, watched him die. People drove by him, you know, so what? Like a dog he laid there. That's what it reminds me of. The White man wouldn't call for assistance because he had painted his floor and didn't want to walk over his painted floor to make a phone call to save someone's life. That's not bad enough. He then does go across the floor to call the RCMP and say, "Look, I just shot this Black man." So the RCMP come from two places, one car from Digby, another car from Meteghan. The car from Digby arrives first. They take this White man and they put him in their car. The car from Meteghan arrives, takes the man out of the car, drives him up the highway five miles, one officer questions him, talks to him, brings him back and then let's him play out the scenario of how he shot this Black man clearly to establish in his mind exactly what he was going to say. They walked him through how he killed this Black man. Now, of course, the statement that the RCMP officer took was never able to be introduced as evidence. There were no witnesses to the statement. Now an experienced RCMP officer - even me and I'm not a cop - would know better than to take a murder suspect off and to take a statement by himself. The next day they took another statement. The tape recorder broke. This was the case where the Judge supposedly made the remarks that, "You know what happens when them Black folks get to drinking." And, of course, everybody here can guess the end result. The White man walked. There are five of these cases. It's open season on niggers. That's all. People have a license to kill us when they want.

Let's take a look at the case of Nicholas Downey. Here's a 20-year-old kid on parole, so he must have clearly been a bad kid. He's driving his White girlfriend from Preston back to Dartmouth. He drops her off and he's on his way home. As he's on his way back from Dartmouth, the RCMP come along, make a U-turn, pull in behind a Blazer truck that's following him back out the highway. They then pull in behind Downey's car and they follow his car back out into the dark and deserted highway. When they put on their lights they say the boy speeded up, they got into a chase and, somehow or other, the cars got involved at a collision at Lake Major Road. The RCMP officer, one of them, takes out his gun, points it at the kid. The other officer says, "Wait a minute, there's no need of this." The kid backs his car into theirs, jumps out of his car and runs away. The officer who drew the gun chased him. The White man who was driving the Blazer then comes upon the scene and the RCMP officer

says to him, "Hey, you know, our man down the road and one of our guys is following this guy; we want you to go see what happened." Well, I mean, I don't know whether he was deputized, was a vigilante or what, but the reality of it is that he went looking and then they didn't find Downey. The RCMP officer comes back says, "No, I didn't find him." They found Nicholas Downey days later - after nothing was done - dead in the river. The coroner says it was an accident. The community says it was murder. I hope you say these things should be addressed and should never be able to happen.

It's very interesting that in one of the other cases, a young boy who is incarcerated is being brought back to Dartmouth in a car. He escapes from the custodial staff and is found dead under the MacDonald Bridge. He was on his way home. He was running to get back home. In that case the coroner said it was suicide. By saying it was suicide the family have no recourse at all. There's nothing they can do. The coroner has absolute power. In one case he says it's an accident, so therefore you can't do anything to the police, you can't do anything to anyone. In the other he says it's suicide, so therefore you can't do anything either. If a Black is a victim and there is a charge, you can be guaranteed the Attorney General's Department is going to put some junior prosecutor in to prosecute, and not aggressively by any stretch of the imagination. The White who kills a Black, right through to the coroner who makes those kinds of decisions, to the judges who say, "You know what happens when those Black folks get drinking,": we haven't got a chance. We haven't got a chance.

So what do we do about this? I have some recommendations. I was hired by the Black United Front on a project that was sponsored by the Secretary of State to look into these cases. Part of what we were attempting to do was find some recommendations that we could give to you. We were hoping, of course, that we would have an opportunity to examine these cases in full during the Inquiry, but that didn't happen. So that now on behalf of the researchers who did this work, and the Black United Front who sponsored this work, and the Secretary of State who paid for this work, I want to give you the recommendations. They're not all that's needed, but they're some things that we looked at.

1.

The RCMP should make a special effort to recruit Blacks from Nova Scotia and have them stationed in Nova Scotia. One of our problems in these communities I'm talking about is that there are no Black cops. And the RCMP in the outlying areas are usually the police that look after it. So we believe that one thing we need is some Black

policemen from the area, and I'm hoping that we get good cooperation from the RCMP on this matter.

2.
Municipal police forces in areas where there are a sizeable number of Blacks should make a special effort to recruit and employ Blacks.

3.
Police community liaison committees with Black representation from the community should be established in areas where there are a sizeable number of Blacks. These committees should be established and chaired by the Nova Scotia Police Commission.

4.
Police procedures and regulations relating to investigations should be available to the public and, upon request, explained to the public by a senior member of the investigating force. That's very important for us because of the things that happened in the Jarvis case and the Downey case. The community didn't understand what the procedures were, what they could do, who they could complain to, and no one seems to know.

5.
There should be a review of how prosecutors are assigned to cases in the Attorney General's Department. In all homicide cases, the prosecutor should be a senior, experienced lawyer.

6.
The Attorney General's Department should appoint more Black lawyers.

7.
There should be Blacks appointed to the bench.

8.
Special funding should be made available to allow more Blacks to attend law school.

9.
Dalhousie University Law School, the Nova Scotia Barristers' Society and the Canadian Bar Association should establish an affirmative action program to recruit Black students. I obviously cannot get into the details of how this should be done, but something has got to be done regarding Blacks getting into law school and being able to get through law school once they're there.

10.
A special court worker should be available to assist Blacks who are in conflict with the law and end up in court, and other Blacks who are victims of crime and want compensation.

11.
A penitentiary liaison worker program must be established to work with Black inmates. At one point there was a Native penitentiary liaison officer and there was a Black penitentiary liaison officer in this area. The present governments, in their wisdom, decided not to fund them. So there's no representation there any more. That should be looked into and done again.

12.
Legal counsel should be provided for the families of victims. This counsel should assist the families to apply for compensation and represent the families at all inquiries or legal hearings. We've had problems with poor people going to hearings as a family and not having adequate counsel. This should not happen.

13.
Procedures and regulations governing the medical examiner should be revised. Specifically, the cause of death should be determined by a rigid set of guidelines that are established by a body other than the coroner's office. There should be a procedure to appeal the coroner's verdict that is simple and easily implemented.

14.
A senior lawyer should be appointed by the Attorney General to assist the families of the five victims that we reviewed in our study in an attempt to resolve these cases to the satisfaction of the family.

15.
Funding for diversion programs should be made available to community groups.

Those are our formal recommendations. We give them in the hope that you would do something with them, pass them on, help us to get them implemented.

There are also some concerns in terms of police policy manuals now in use which may be outdated. It was also suggested at our Black caucus meeting last night that an independent Review Commission should be set up here in our area. There's got to be some way of making the police accountable to the community so they are not able to act in such an arbitrary fashion. And there must be some

way to monitor the things that we have suggested so that we can ensure that they're implemented.

In closing, I want to say it's really been a pleasure to participate in this Commission. I look forward to some very good things. I say to you that you're either part of the problem or you're part of the solution, and in those famous words, "Which side are you on?"

Thank you.

Esmeralda Thornhill

I applaud this unprecedented initiative taken by the Royal Commission on the Donald Marshall, Jr., Prosecution. This Inquiry has courageously created significant agenda space for an in-depth and unflinching examination of the impact of racism on Black and Native people in the administration of criminal justice in Canada. It is my hope that this prestigious forum will contribute to validating and affirming publicly the current day-to-day existence of racism in Canada.

I made a deliberate choice to focus directly on racism. This in itself is no easy challenge since it admittedly feels so much more reassuring and positive to forge ahead and present recommendations.

Imagine that we in this room constitute the world. Now the history of the world is going to be written. Each one of us gets a chance to tell our story. We each get to go off, do our research, write it up, relate it, recount it, put in, omit, whatever we want, and it all goes in to the story of the world. We constitute the world in this room. So we each go off, we do our work and then comes Vernissage Day, the book is ready. It's dedicated by some personality of renown, it's gold embossed, leather tooled, and we're each waiting impatiently for our copy. Why? Because each one of us, when we get our copies, turns immediately to the table of contents to look for our chapter. I have my copy. I turn immediately to the table of contents. I don't find any mention of my chapter. I go over it again, a second time more seriously. I'm beginning to panic, no chapter. Perplexed, I turn automatically to the index in the back with mounting dismay and incredulity. I scour the columns to look for any entry referring to my chapter, my story, my contributions. No mention. In desperation, I go through the book page by page, line by line, trying to glean a mention, a reference in the margin, in the footnotes, by indirect mention. Nothing. In total dismay, I look around to complain but all of you are so gleefully happy, gloating and reading your chapter. Feeling powerless to oblige you all to scrap your copies and start all over again, I face reality. The story of the world has been written and I have been written out of history.

This is the lot of the people like myself, people like the Native peoples, in fact this is the lot of the majority of the world population.

We have been written out of history. Our life experiences, contributions, folkways and aspirations have been left out. As Black people, we are absent from Canadian history and, more importantly, our life experiences, past and present, individual and collective, are also absent. Our particular streams of consciousness do not inform Canadian history. We have been erased and with erasure goes any consciousness of our daily experience of racism.

On a summer's afternoon, a father driving home with a cellular telephone in his car receives a panic call from his older child. A younger child, a toddler on his tricycle, has been dragged off and taken to the police station.

Another day, a 12-year-old-girl is taken to the police station from the school. Why? She attempted to go back into the school at recess to use the washroom facilities. A teacher stopped her and told her she had no permission because she had not asked the teacher before going into the school. The girl said she saw no one and she had to go badly. The police take her away to youth protection, into the system. Her mother is at work. She's not been abandoned.

An adolescent teenager, repairing a broken window pane of the family home in a suburban district of Québec, is taken away by the police to the station on suspicion of breaking and entering his own house.

A Caribbean delegate to an international women's conference is accosted at a bus stop, pulled out of the queue by police officers, questioned and forced to present her passport and account for her presence in the well-to-do suburban residential neighbourhood where she has been billeted by conference organizers with a local Québecois family. Why? Because neighbours wondered what she was doing around that neighbourhood.

A Black male high school teacher chances to witness two Metro constables manhandling a youth who just happened to be his former pupil. He decides to stop and watch. The constables who see him approach him threateningly with clubs drawn and order him to move on.

During a summer's day sidewalk sale, a merchant refuses to sell sale merchandise to a woman shopping. Vilifying her with verbal abuse, he orders her to leave his store. She appeals to a nearby police officer on foot patrol. She explains to him and asks him to accompany her because, on principle, she wants to buy the merchandise. He says, "Madame, go and buy elsewhere."

A Municipal Court Judge, hearing a highly publicized case in which a Black woman faces criminal charges brought by the police addresses the jammed-packed courtroom. First, he expresses surprise at such a crowd. Then he admonishes people not to make of the situation more than what it is. He concludes in stentorian tones and

affirms that in his municipality there is no racism.

Day in and day out, attempts to be sociable on the part of White fellow citizens inevitably start off with the bungling, "What island are you from?" They don't mean Montreal.

On a warm summer's Sunday afternoon, a church-dressed Black woman of a certain age, driving her spankingly washed, well-kept, costly car with her hand out the window like this, is stopped and pulled over by a young police officer. After a long period of waiting while the officer examines her documents the officer returns to her car and hands over her documents. She asks, "What is the problem officer? Why did you stop me?" "Oh, just checking."

A woman in lawyer garb and briefcase is accosted on her way to the lawyer's cloakroom in the basement of the courthouse in Montreal. She is accosted by a courthouse guard who asks, "And where do you think you're going?"

A young woman applying for a learner's permit to drive presents her Canadian passport as required ID. The clerk disparagingly flips through it from start to finish, once, twice, and then barks "Where's your pink slip?" "What pink paper?" "Your pink paper?" "Instead of looking at the colour of my skin, you should look at the Canadian passport you're holding. Since when does a Canadian citizen need a pink paper to show they have entered Canada legally."

Racism is a daily reality for Black people living in Canada. It is not a novel phenomenon. A cursory overview of our history reveals how the roots of racism lie deeply imbedded in Canada's past. Significant signposts stand out - the enslavement of Native and Black peoples in Nouvelle France under both the French and English regimes, the *Indian Act* which inspired the architect of South African apartheid; Canadian immigration policy with its enforced colour bar - White if possible; the unabashedly exploitive government-sponsored domestic scheme of the 1950s that recruited educated Black women from the Caribbean to come and work as servants in the houses of well-to-do Canadian families; Jim Crow or segregationist union policies whose exclusionary practices forced Black railroad porters to organize on their own as the Brotherhood of Sleeping Car Porters; a Canadian civil service whose hiring practices did not embrace Blacks; multiple court rulings in public services which held that the overriding principle was freedom of commerce, the liberty to contract freely with whomever one desired, thus dismissing the right of Black members of the Canadian public to non-discriminatory treatment.

These salient signposts and others have combined to bequeath to today's Canadian institutions a legacy of racism. The justice system is no exception. Yet our justice system, along with Canadian society as a whole, would appear to be playing ostrich, indulging in an

obdurate form of endemic, wilful blindness that refuses to recognize that *de facto* and *de jure* societal practices have indelibly written racism onto the daily agendas of each Black and Native person living in Canada.

Too often we as a society have disregarded our legal history to keep the extraordinary insensitivity and brutality of our past from our full consciousness. In so doing, we are falsifying the perspective in which we evaluate the present state of affairs. Slavery, with it's concomitant value system, remains the principal factor which predetermined and limited the role which Blacks - past and present - could play on the Canadian scene. For although slavery as a legal institution was legally abolished by a mere pen stroke, the legislators' pen did not succeed in obliterating the attendant collective mind set, whose social attitudes and practices equated Black skin with slavery, with inferiority. As a result I'm positing that an unwritten social consensus emerged then and endures today.

This consensus seems to dictate the proper place of Black people and Native people. This classic consensus would appear to determine:

1.
Which right a Black or Native person is entitled to exercise, and

2.
How these rights can be exercised. This unwritten law is all too pivotal in giving meaning to or sapping meaning from our democratically inspired written codes. It would almost appear that by some unspoken societal consensus, a generalized negativity towards blackness persistently links Black skin to criminality.

3.
All too frequently Black skin colour becomes the initiating catalytic factor which jettisons Black people into the criminal justice system. It is also Black pigmentation that colours and preconditions and plots the quality of our trajectory through a system seemingly inimical to our interests.

4.
To Black offenders the justice system doles out uncommonly harsh punishments. The evidence is there. And to Black beneficiaries, it grudgingly grants, if not denies, redress or reparation.

Legal culture is much broader than laws and legislation. Legal culture is an inclusive term which, by encompassing behaviour, values and assumptions, compels us to deal with unwritten law that is entrenched by social convention, customary practice and which itself predetermines whether discretionary decisions will be benign or adverse.

Service users and victims seeking reparation will find the quality of access and response available to them commensurate with the "place" society has reserved for them. The prevalence of racism in Canadian legal culture today is demonstrable. A general conspiracy of silence operates not only to obfuscate the issue of racism, but also to deny its very existence. This denial eliminates the possibility of addressing and implementing imperative corrective measures.

Here are but a few examples, and they're only a few. The common law of Great Britain has no traditional response or remedies for racism because racial or national equality was diametrically opposed to the national interest of colonialism and the maintenance of a British empire on which the sun never set. Consequently our *BNA Act*, emanating from the British imperial Parliament, remains silent on the issue of race or racism.

Certain law school admission departments still require that a photo accompany the application form before processing a candidate. To Black people, this is inherently suspect. In law school there is a dearth of positive Black role models. In law school, Black students fall victims of social alienation and exclusionary mechanisms which penalize them while they enhance in-group networking, for example, note sharing, group study, articling tips, 'encadrement', summer jobs and permanent gainful employment. When you're looking for a clerkship, many Black students are in a dilemma. When you have a resumé on which affiliations with Black groups or Black community advocacy work appears, you run the risk of that unleashing a gamut of reactions at interview time - intimidation, hostility, amusement, even contempt. In law school, law teaching is devoid of the racial perspective.

Racism should also inform constitutional law. I'm not talking about one course added on as a footnote, Racism and the Law. I'm talking about mainstreaming. I'm talking about a dimension that is going to give body and depth and a certain stream of consciousness to what we study as law. Racism should inform constitutional law, administrative law, human rights law, contract law, freedom to contract having primacy over the right to non-discrimination, property law, restrictive covenants. If racism informed all of these areas of law, there would be a whole other stream of consciousness that practitioners, whether they end up being legal professionals, lawyers, researchers or judges, would have another understanding.

Legal scholarship too is at fault. Bar schools provide no racism awareness course in their curriculum. Law professors, researchers, judges are uninformed of the role law and legal apparatus have played in the reality of Black and Native people's lives. Critical legal scholars to date have failed to incorporate the authentic experience of minorities in North America. This failure to take account of the historical and existential needs of non-White people expresses itself in ideological paradigm and organizational practices that are totally inimical to minority interests.

Our tools are faulty and faulty tools vitiate the end result. Our arsenal of tools in legal culture is sorely in want of repair. For example: a Canadian index to legal periodical literature comports no category or heading labeled, "Racism" or "Racial Discrimination," thus incontrovertibly conditioning the body of doctrine available to practitioners and to the courts to assess racism. We have no case commentaries on decisions involving incidents with racial overtones. We can boast no solid track record of having exploited the technique of calling expert testimony to prove racism so that the courts may take judicial notice of what is public notoriety for so many Black and Native communities throughout Canada. When establishing the quantum in cases of racial discrimination, the deterrent value of punitive and exemplary damages is underexploited. The piffling amounts established fail to reflect the social gravity of racism and trivializes its injurious nature. These negligible compensation awards do little more than reinforce the stereotypical spectre of that historic U.S. three-fifths clause, during slavery, which deemed that a Black man was worth no more than three-fifths of a White man.

We do not understand racism enough. Chaos reigns. We confuse impartiality with neutrality. We fail to grasp the very necessary distinction between racism and other blameworthy misconduct such as brutality, abuse of power, excessive and deadly force.

In the courtroom, the contrived invisibility of our Black experience in legal culture and in history contributes to misinformation and misdiagnosis about Blacks. Eyeballing - steady, direct and unwavering visual contact - when being interrogated is, for some, tantamount to rudeness; for others it's indicative of truthfulness. If successful, one can perhaps be exonerated. If failing, one can pretty well be sure of inculpation.

Different standards and concepts of punishment seem to have been devised in the collective eyes of Black communities across Canada for Blacks. "Stop and search." "Just checking." These are just routine. A disproportionate number of Blacks are hauled up on minor charges which are later dropped, sometimes after spending more than 24 hours in prison. A disproportionate number of Blacks are roughed up by police and then charged with criminal offences against the

police. When, collectively, we hear obstruction of justice or assault on a police officer, the charges are immediately inherently suspect. A disproportionate number of Blacks experience run-ins with the police. When Blacks try to insist on or assert rights and/or confront vocally the reality of racism, they are often labeled lippy and uppity, and charged with mischief.

Racism is also a fact of life in our correctional institutions. Racist behaviour and attitudes in correctional institutions pose a question as to the possibility of Blacks or Native inmates receiving rehabilitative treatment and parole. Punitive actions taken against Black inmates, for example, seriously limit their participation in educational trades training, recreational programs and self-improvement programs. Racist behaviour affects negatively in parole decision-making, assessment and evaluation since it profoundly affects the Black inmate's conduct, performance and output, which are assessed for parole. In halfway houses, the conduct and performance of Black residents will be significantly influenced by the racial atmosphere that is present.

Every incident with racial overtones seems to be systematically treated as an isolated, unrelated incident. This offends, if not outrages, a collectivity whose critical consciousness of the criminal justice system is informed by our foremothers' and forefathers' experience with the law - cavalier treatment by police officers, for example; a dismissive attitude towards victims; police officers responding with misunderstanding, reluctance and even animosity; police officers responding to unproved suspicions with over-enthusiasm, unwarranted assumptions and excessive and sometimes even deadly force.

Remember when I mentioned the line: "And which island do you come from?" General immigrancy status is conferred on Blacks and played out in legal culture with dire effects, since an instinctive, spontaneous, complicity of guardians of order operates with oiled precision. For example, the Metro constables, the immigration officials, the private security guards, and the police all seem to be on the same wavelength.

I don't think that it would be fair for me to just go right on to recommendations without at least trying to offer, if not just for reaction, some kind of analysis. I'll share with you the conceptual framework that I use in the work that I do. While majority group persons feel an undeniable discomfort when compelled to confront the pervasiveness of racism, this in no way cancels out the important leverage the factor of power plays in the equation of racism. In the interest, therefore, of clarity and rigour and to facilitate an understanding of racism, I'm offering the following operational

definition. Do feel free to accept it or reject it, but don't just reject it with a void. Replace it with something else.

"Racism is racial prejudice plus *power*, institutional power."

Therefore, racial prejudice plus institutional power equals racism. What that means is that from the minute that you do not have access to that institutional power to invoke, to give expression to whatever ideas, attitudes or prejudices you have in your mind, that's not racism. The implications of that are important because prejudice cannot become racism in the absence of institutional power. Therefore, people in situations of power and authority have an onerous responsibility not to remain passive. What this means is that we have to deal with behavioural modification rather than dealing with attitudes. I'm not saying that the attitudes are not important, but the primacy or the priority has to be given to the behavioural modifications.

Now for those who might be having some doubts, we do it every day. If any of you get on a bicycle or get behind the wheel of a car, we legislate behaviour in order for the traffic to circulate in an orderly fashion in the street. We can do it also according to the order and the democratic value systems that we purport to adhere to.

Though our dominant experience of the law as Black people has been that of a victim, particularly when it comes to issues of racism and racial discrimination, law remains too valuable a tool for us ever to abandon. Any corrective measures or solutions must be predicated on two accepted premises.

1.
Racism exists as a demonstrable social factor in social relations in Canada and the justice system is not excepted.

2.
A resolute political will must be adopted to acknowledge up front the existence of racism and to set about eliminating it by moving it onto the public policy agenda. Policymakers, legislators, and government have an extra responsibility to create a climate which will be more inhospitable for racism.

In light of the foregoing, I am proposing certain recommendations. Canada has ratified the Convention for the Elimination of Racial Discrimination but has not yet made the special declaration concerning the optional complaints mechanism contained in Section 14. This mechanism would allow individuals and groups to bring complaints to the international arena and seek redress at the

international level. I'm recommending that the Commission recommend strongly that Canada make a special declaration to make this optional complaint procedure part of our domestic law.

As party to this Convention, Canada submits an annual report on its efforts to eliminate racial discrimination throughout the whole of Canada. I'm recommending that Canada take the necessary steps to publicize this annual report through wide distribution.

Given the silence of our legal history, it is important that racism be named. I am inviting the Commission to consider that our *Criminal Code* address racism explicitly by creating a distinct and separate infraction for racially motivated attacks on persons and properties. When other crimes occur with racial overtones, I'm recommending that stiffer penalties and sentences be handed down. For those who object instinctively we have robbery and armed robbery. And when armed robbery happens, the sentencing level is by stiffer penalty.

I'm suggesting that this Commission recommend that the elimination of racism be moved onto the public policy agenda of this country. I think it's the best occasion that we have to really do some public education.

I'm also recommending that the justice system proactively issue a declaration of anti-racist policy for the entire justice system, wherein the justice system as an institution shoulders its responsibility of aggressive leadership signalling to the country and to its personnel not to practice racism and shows its intention to eliminate racial discrimination by sanctioning it swiftly when it occurs.

In the interest of public education, I'm suggesting this declaration of anti-racist policy should be the object of a high-visibility campaign among staff and public. In Québec, we've had a blitzing campaign against drinking and driving. We need aggressive publicity measures like that.

I'm also recommending that this prestigious Commission formally take cognizance of the daily existence of racism in Canada and make strong recommendations for legislative change to follow. This would be a first step. Further, I'm suggesting that symposiums, seminars, training sessions on racism as a substantive issue, including the history and legal history of racism and racism awareness, be prepared for members of the judiciary, Crown prosecutors and civil servants in the justice system.

I'm recommending that law faculties, bar associations and government institutions should reserve agenda space for the issue of racism.

I'm recommending that there be a separation of the internal discipline of the police - improper wearing of a uniform, administrative regulations - from the Code of Ethics and that the Code contain a disposition that bans racism and racist behaviour

explicitly and provides stiff penalties for any violation and stiffer penalties for any other violation that is tinged with racism.

I'm also recommending that police departments and government should proactively set about reducing the wide areas of discretion open to officers by issuing clear and restrictive policies, rules, statutes and municipal ordinances and department rules regarding the use of force, by enunciating clear and strict procedures for reporting firearms discharges.

Hiring criteria in the justice system has not been updated to meet the exigencies of a multi-racial and diverse cultural country. These should be revised. Anti-racist dispositions must and should be a job-related standard requirement. Psychological screening should be used as an integral part of any selection process and should be performed by qualified experts in order to eliminate those candidates with a pre-disposition towards violence, instability and racial prejudice.

More emphasis should be placed in the training programs on the social service aspect. Firearms refresher courses should include training on legal standards governing excess and deadly force. Special crisis intervention and conflict management training in situations with racial overtones should also be provided for new recruits and also for older veterans.

Numbers do count. Affirmative initiatives must be taken to involve Black members of the Canadian public throughout this country in the justice process as meaningful partners and participants, for example, civilian oversight of police conduct, racism awareness training with Black role models as authority figures, legislative drafting, elaboration of policy at the blueprint stage, jury duty, delivery of services, gainful employment at all levels including the upper echelons of decision-making.

We must stop being evasive. We must name the problem. I am suggesting and I'm recommending most strongly that this Commission set the tone for this country and send a message of change of mindset by recognizing and naming racism from the body of evidence that has been adduced before this Commission.

Bromley Armstrong

Mr. Commissioners, I say to you there are many Donald Marshalls in the courts daily. We have to look at the Marshalls and the others like him that have been served an injustice and see how we can correct this.

I see many similarities between what's happening here and what happened, to my knowledge, in other parts of this country, particularly in Ontario where I come from.

Ten years ago I was in Nova Scotia and I came here because one of the sons of Nova Scotia was gunned down by the police in

Toronto. A young, healthy, Black man, surrounded by nine police who could not restrain him without a weapon and he was sent to his maker. What happened? Nothing. You can't charge the police. They have a license to kill. And ten years later we're still fighting the same battle. Just recently the police in Toronto visited a disabled person they'd shot some four months earlier. Three burly policemen, who are there to serve and protect, went to a man who is disabled, saw him eating his dinner, sitting on his bed and the next thing you heard the man was killed. By first reports he was holding hostages. The only hostages he was holding were those qualified people who enforce the law who could not restrain a disabled man who was having his supper. What's happening in that case? We're still waiting to hear how the investigation will turn out.

Our position is that the police do not investigate themselves. We need civilian investigation, people who can give us the facts and not the coverups.

I'd like to say to you, Commissioners, that when Blacks and Natives come in contact with the justice system, it reflects a lack of adjustment to this society that is alien to us, our existence and our aspirations.

The problems that they discern are there long before they come in contact with the criminal justice system. For example, the people who leave the school system early are not motivated for any educational training because, somewhere along the line, they lost that drive. Young Blacks feel there is no future, so why stay in school? They see very few teachers who look like them. They see very few guidance counselors that they can relate to. Teachers will tell them - as I was told when I first came to Canada - "Why get an education? If you're a Black man, you're going to be a porter. If you're a woman, you're going to be a domestic in some Canadian household." So the Blacks say, "What the heck, we don't need education, so we drop out along the way." It's worse than that.

We see more and more young Blacks getting involved with the law. The first contact they have could be for shoplifting. It could be for traffic violations. It could be for creating a disturbance because in the place I come from we talk very loud. If two or three of us are gathered in the street talking about a cricket game, I'm sure that's going to attract the police because somebody is going to say that if we're laughing and talking we must be crazy, these guys are fighting. They don't know we are enjoying ourselves. Police come, "What are you doing in the sidewalk? Why are you guys fighting? Are you planning to rob the store next door or something like that?" Because if two or three Black people are gathered any place, it's got to be a conspiracy.

I've heard a story about a young Black man who was pulled out of a car and charged for being drunk and disorderly. But that's all right. I understand these things happen - you can sit in a car and be disorderly talking to yourself. It's nothing new.

And then when a Black man gets before the courts, we find that in the court system it's sometimes no better because the system is just like the school: lily White. The poor judge doesn't understand the culture some of us come from and he perceives us to have just come off the banana boat also. The Crown attorney: "What the heck are you doing here? You should be back in the bush where you come from running around barefooted, chasing snakes."

So you get into a problem. You depend on a legal aid lawyer or somebody who is supposed to tell you about the legal system. But sometimes, because of lack of education, lack of understanding of our system, the people who are trying to tell us don't know the difference between pleading guilty or not guilty, and don't know that the consequences of a guilty plea could be a sentence in jail.

A policeman will stop you for a traffic violation. If you look prosperous, dressed up in your three-piece suit or something like that, he's going to figure that you must be a pimp because you're driving a big limousine when he pulls you over.

And then they lay so many charges. If they pick you up for shoplifting, before the cop is finished, you may also be charged for resisting arrest and assaulting the police. When you get before the judge, he has such a long list of charges against you that when they start cutting them down at the discretion of the Crown, he says, "Well, let's take this off and that off and leave this one on and the other one on," you're glad to say, "Guilty, sir. Put me away."

We have to look at the laws and the legislatures. We've got to look at the people we elect to our House of Commons. It is in our hands to start to be serious about our political affiliations and what we do to get some people that look like us in the House of Commons. We need to change the system of appointment to the bench, as well as those of Crown attorneys and police boards and commissions.

We need to take a very good look at the legal aid system. Does it do justice to the people who really need it? Because of the economic position of Blacks and Natives, they find themselves in a position where they can't hire good legal counsel and they have to depend on the system to provide the legal requirements that they need. And when you're poor, sometimes you get very poor advice, and getting very poor advice leads you to confinement because a number of things happen.

We have to look at our courts. Our courts, as well as our police departments, should reflect the community in which they serve. We have been fighting in Ontario to get the police departments to start

recruiting Blacks. Toronto prides itself that it has the highest complement of non-Whites of any police force in Canada. Of 5,500 police constables in Metro Toronto we have a grand total of 118 non-Whites - the best of any place in Canada.

We have to look at the court system from the clerk of the court right up to the bench. They have to have some empathy, some understanding of the poor people. Can Natives and Blacks cope with the bureaucracy of the court system and the criminal justice system? Do they understand what is happening around them? Do they understand our system, why they are there and the things they should be able to do? I don't think they do, and I ask you this question, do you feel that Blacks and Natives are treated fairly before the law? I say to you, "No." I don't think they're treated fairly before the law.

I'll give you an example. I saw a clipping from the newspaper just recently about a young Black man who was driving a nice expensive sports car. He had this car for two years and he had no problem. Then he had the windows tinted. Suddenly a cop in his zeal to show he can administer the law pulled him over and gave him a ticket. The windows are too dark. I don't know if it was the window or the man in the car was too dark but he got a ticket, and he finally went to court and he was fined $40. That man happened to be one of the premier athletes of this country, the high jumper Milt Ottey. He has finally come to the conclusion, "I wonder if it's because I am Black that they gave me this ticket for $40." And he said to himself "I've had this car for two years and everybody said it was fine, suddenly I'm getting a ticket for having my windows too black." That's one case.

You've heard about the *Young Offenders Act*. If you're under 18 and you do anything, they can't tell a young offender's name. We have a young offender in Toronto who committed murder - killed a mother, father and a child. His name can't be disclosed. He's White. Then we have a young Black who is 16 years old. He discharged a firearm into the ground, the bullet ricocheted and hit a young fellow in his arm. So the young Black is now called armed and dangerous and wanted by the police. His pictures appear in the paper and his name appears in the paper. You know what colour he is. He ain't White and he's dangerous. But he didn't murder anybody. So there's a discretion, with no equality in the law for people that look like me or Natives. I think we need to look at those things.

I have a letter here that was put out by a division of Metro Toronto Police warning storekeepers about being on surveillance for people who may come in and shoplift because there had been a rash of break-ins at night. This letter tells the storekeepers to be on the lookout for people who come into their nice expensive stores and browse around. If you see any suspects browsing, make a note of it.

Try to get their description, a nice drawing and, if you can, get a car license number. But be very discreet. And the letter went on to say, "The suspects in these entries are usually young Blacks." Okay. They're usually young Blacks. So if you're Black you can't go into any of these expensive stores. You don't dare browse. You better not put on a hat and see if you look good in it. Because you're going to be a suspect. We've had this happen.

My suggestions to the Commissioners: I think you need a mandatory affirmative action program with goals and timetables to recruit and to place Blacks in every facet of the criminal justice system, starting with the police, who enforce the laws, the Justice of the Peace, the Crown prosecutors, the clerks in the court, right up to the judges on the bench. I also feel that the discretionary powers given to people in the administration of justice should be interpreted a little bit more leniently to accommodate the people who are now using the system most; those people, I think, are Natives and Blacks. There should be a review of the legal aid system to provide competent legal services and advice to ensure the rights of the people who need these services are not violated.

I'm also suggesting that first-time offenders be referred for behavioural evaluations and treatment centres instead of being placed behind bars.

One of the things I think that the Native and Black groups here in Nova Scotia and other parts of the country should be looking for is funds so they can monitor the courts and the criminal justice system.

I strongly recommend training programs throughout the criminal justice system, sensitization programs for the police, the Justices of the Peace, the Crown prosecutors, the clerks and all the people involved in the court system. It is very, very important because they need to be able to relate to the people who come before them regularly.

Finally, there should be a civilian complaints commission to investigate and to discipline police in every jurisdiction in this country where police are subject to misconduct. We have something in place in Toronto and I can say to you it is like a baby without teeth, but at least we have the baby and we can develop the teeth as we go along.

Dan McIntyre

I come from this part of the country. I was born and brought up in Saint John, New Brunswick, and I can relate very well to some of the things that have been said here about the history of Blacks in this part of the country. One of the things that always amazes me is where you find Black settlements and where you find people living in Nova Scotia. The same thing is true in New Brunswick too. We have a

saying that "where the pavement stops, that's where the Black community starts."

I was in Saint John a couple of months ago making a presentation to some of the politicians and other esteemed leaders of the community, and I said that two or three years ago I was up in Elm Hill, New Brunswick where my parents were from. It is a small Black community just outside of Gagetown. When I went up there, I noticed that as I drove down the road to visit and chat with people that the road is a total dirt road. Then when I got to the other end of the road, there was this gap and then all of a sudden the road was paved. I looked over and there were these prosperous farm houses on the end where the White people lived. Somebody in the Department of Transport has to deliberately say, "Guys or gals, " as the case may be, "I want you to go out there and I want you to pave the part of the road where the White folks live and I want to make sure that you don't pave the part of the road where the Black folks live."

That kind of experience really speaks to the issue that this Commission has taken the courage to open up for public debate and discussion, and that is the issue of racism in our institutions, in all facets of our life in Canada. We don't like to think of ourselves, as Canadians, as being racist. We think that is something that the South Africans have to deal with, that goes on in Britain, that goes on in France, or in the southern United States, but not in our own backyard.

I think we deserve a lot of credit here in Nova Scotia for exposing that myth for what it is. Racism does exist, and it exists everywhere in Canada. It's not something that is just a historical legacy. It is something that exists here today.

I'm not going to go through a long list of the problems in the justice system, but I would like to touch on it a little bit, not only in terms of the justice system but in terms of other areas in which Black people and Natives come into contact with the school system, housing, social services, practically all facets of our life.

I want to talk to you about what I think needs to happen in terms of sustaining and continuing the work that's been started here in Nova Scotia to make sure that we don't lose the focus on this issue and this problem of racism. And I'd also like to talk about what we're trying to do in Ontario so that you can perhaps learn from our mistakes and there may be some things that you can pick up as ideas on where to go from there.

Let me start off by just very quickly reviewing some of the things I've picked up in the last couple of days and from reading Wilson Head's study of the criminal justice system in Nova Scotia.

There has been a breakdown in terms of police-community relations. Police see themselves in a role in which they can't trust or

relations. Police see themselves in a role in which they can't trust or have confidence in the Black community, and the Black community can't see themselves dealing with the police in any other way except confrontation.

There's inadequate representation of Blacks on the police force. It's ironic. I was down here in June for a part of the Inquiry and I noticed a number of police officers, but they didn't have the metropolitan Halifax badges or uniforms. I looked a little closer and I found out that they were Toronto policemen who were down here on an affirmative action program to try to recruit Blacks from Nova Scotia to work in Toronto.

The third thing is police misconduct and differential treatment based on race. Bromley has talked about some examples, Esmeralda has, Rocky has. I don't need to go through the particular issues related to that. We know that exists, we know it's a problem.

In terms of the courts, again, there's inadequate representation of Blacks in the court system as judges, lawyers, Crown prosecutors at all levels. There's differential treatment in the laying of charges and sentencing. There has been some evidence that that may, in fact, be a very serious problem here in Nova Scotia and elsewhere.

There's also lack of accountability. If there are problems in the justice system, in the court system and so on, who is accountable for correcting those particular problems?

Similarly in the corrections end of the criminal justice system there's a differential treatment of Black and Native inmates. There's harassment and brutality as well as inadequate support of rehabilitative services for Blacks, inadequate representations of Blacks on staff, and, again, a lack of accountability.

We find that Blacks who are most likely to have contact with the police are those Blacks who are not connected in the school system. They're young and they've dropped out. There's one reason in Toronto - it's called 'streaming'. Black kids are streamed into certain kinds of programs that often lead to dropping out or at least not to a job at the end of the rainbow.

There are basically three forms of streaming that go on in the Toronto school system. One has to do with basic programs, a second is called general programs and a third is advanced programs. The advanced programs are academically slotted. The drop-out rate among kids who enter the advanced program in high school is about 13 to 15 percent. For the general and basic levels the drop-out rate by the time they get to high school is anywhere from 60 to 70 percent of the kids, according to a study of the Ontario School system conducted by George Radawanski in 1987. Guess where Black kids get streamed? In Ontario they get streamed into those basic and general level courses which, in fact, sentence them to a life of

unemployment, underemployment and possible conflict with the law in the criminal justice system.

I saw a 1988 study, conducted by the Recruiters Guild of Canada of executive managers, employment agencies, those people who are involved in hiring decisions of recruitment of people for all sorts of occupations right across the country. There were 672 respondents in this survey. Of the 672 respondents in 1988, 94 percent admitted that they had discriminated against people in the selection or recruitment of people on the basis of colour. That represents 94 percent of 672 people that responded to the survey. In 1988 I think that's a remarkable admission that something is seriously wrong in the system in terms of combatting things that we call in polite terms, systemic discrimination and - in not so polite terms - racism.

But let me get to my point. What do I think is needed? I'm not going to talk about the need for community mobilization to keep a watch dog, and to lobby and to pressure for changes that are obviously needed. That goes without saying. I applaud what Bromley said about the need for funding and for support to the community to ensure that the changes that are needed in this system do occur. Without that, anything that I say from now on is not likely to happen, to be quite frank with you. Let me say that I think that the Nova Scotia Government's commitment to and responsibilities for eliminating inequalities based on race in all social economic and cultural policy areas, including the criminal justice system, has to be very clearly stated and articulated in some sort of policy format.

In Ontario we have what's called an Ontario Policy on Race Relations. Let me read a couple of excerpts. It's not important because of what it says, but as an acknowledgement that racism is an issue in Ontario and as a reference document which the community and other advocates can use as a benchmark. It says in this document that,

"The government will take an active role in the elimination of all racial discrimination, including those policies and practices which, while not intentionally discriminatory, have a discriminatory effect. To this end the government is committed to:

(a) employment equity policies and practices within the public service and throughout Ontario that ensure equality of treatment and opportunity through affirmative strategies;

(b) government services to the public that reflect the particular needs and perspectives of racial minorities;

(c) a positive and balanced portrayal of racial minorities in the government's communications and advertisements;

(d) appointments to agencies, boards and commissions that ensure these bodies fully reflect the racial diversity of Ontario."

I just might add that with us for the last couple of days is the first Black commissioner on a Police Commission in Ontario, the Metropolitan Toronto Police Force, Roy Williams, who is sitting over there. He's on that particular commission because of people like Bromley Armstrong, Wilson Head and other very active people in the community who have been lobbying for this kind of change for many, many years.

It also goes on to say,

"The government will also continue to attack the overt manifestations of racism...and to this end declares that racism in any form is not tolerated in Ontario; all doctrines and practices of racial superiority are scientifically false."

Now that's a piece of paper, but it's something, in fact, that in Nova Scotia you can build on as a first step.

The second thing I would recommend to the Commission to include in any report to the Nova Scotia Government is that any policy, document or framework clearly defines the Nova Scotia Government's commitment to and responsibilities for reducing and eliminating racial tensions and conflict. There has been a recent development that's a spillover from the United States, which is a spillover from Britain and France and Germany - a youth movement called 'skinheads'. There are the benign, innocuous type of skinheads and there are the racist, fascist, White supremist skinheads. The latter are growing exponentially in the United States and in some parts of Canada. Where there were two or three yesterday, there are 30 or 40 today. It takes on a particularly insidious manifestation in that with it comes a whole culture. It has music. It has a certain kind of belongingness and so on. And it is hooked into the White Aryan supremist groups in the United States and the Ku Klux Klan. Howard McCurdy, our esteemed Member of Parliament from Windsor knows that they recently announced that they're opening up headquarters in Windsor, Ontario, to promote the supremacy of the White race. They're declaring and issuing blood oaths that they are committed to making sure that Canada will be White and preserved for Whites only. What is so disturbing about that is that it is developing a certain amount of attraction for young people in a number of centres in Ontario, in Montreal and in Vancouver. I don't know where things are

in Halifax, but this is a problem you should be aware of.

The third recommendation is that the Nova Scotia Government define its responsibility for putting together a policy framework and for the implementation of a policy framework that is government-wide. This is not the responsibility of one agency such as the Human Rights Commission or one special office or whatever, but that of virtually every department in the Nova Scotia Government machinery and all their agencies, boards, and commissions for which they are responsible. They will be held accountable for what they do in terms of improving the racial equality index, if you will, in Nova Scotia and reducing and eliminating any racial conflict or tensions within their jurisdictions.

The fourth thing I would recommend the Commission to consider is the establishment of a special office and a Minister responsible for race relations that would coordinate and monitor the government-wide implementation of its race relations policy and would report annually in some public format on the government's initiatives and progress in terms of implementing any particular strategy.

Let me talk to you about what we're trying to do in Ontario along those lines and what they're now trying to do at the federal level as well.

In Ontario, as I mentioned, we do have an Ontario Policy on Race Relations. We have a Minister of Citizenship to whom I report, who is responsible for race relations, multiculturalism and human rights. There is a Cabinet Committee on Race Relations, which is comprised of about a dozen Cabinet Ministers, including representatives from the criminal justice field, education and so on and which my Minister chairs. There is a $7.7 million fund available to government ministries to implement what's called a multiculturalism strategy. We've got some fine-tuning to do on that in terms of the harder areas of racism and anti-racism. But that's available for implementation. There's also the organization which I lead, the Race Relations Directorate, which, among other things, is charged with the responsibility of coordinating and monitoring the implementation of this race relations policy.

At the federal level they have a Minister of Multiculturalism. The *Multiculturalism Act* that was passed in 1988 includes reference to racism and race relations and requires an annual report to go to Parliament on any progress vis-à-vis these government initiatives. To date, they have no significant incentive fund like $7.7 million. They have a couple of hundred thousand dollars for departmental initiatives in race relations and multiculturalism, and they have formed a new Department of Multiculturalism.

Let me move from the abstract to what this may mean in terms of programs to deal with racism. There is now a Public Complaints

Commissioner's office established which is a civilian review agency that investigates alleged police misconduct.

The jurisdiction of the civilian review agency is only in Metro Toronto. It's not as strong as a lot of people would like it to be - it doesn't have the powers to initiate investigation of complaints or problems of police misconduct, for example. But it's a start.

In Metro Toronto, there's a Council on Race Relations and Policing, which is funded by the Attorney General to bring together representatives of police and community leaders to address race relations issues in terms of relations between the community and the police, what's going wrong, what needs to be done and so on.

The Ministries of Solicitor General, the Attorney General and Corrections are represented on the Cabinet Committee on Race Relations and are required to develop one to three-year race relations action plans to address barriers to fair treatment of Native people and racial minorities in the criminal justice system.

In Ontario municipalities there are currently 15 municipal Race Relations Committees to address issues of equality and racial tensions in conflict. I mentioned opening of the skinhead's Windsor office. The Windsor mayor was contacted by our office and encouraged to hold a special meeting of the Windsor Race Relations Committee, which he did. Out of that meeting, the committee issued a public statement condemning the activities of the skinheads, alerted the school boards and universities and colleges to be aware of these kinds of activities and to put into place some kind of educational programs to deal with this.

These committees have different models of representation. Some of them are predominantly made up of community representatives, others have a blend of community, municipal politicians and institutions such as the police on these committees.

In the educational area, there are currently 15 to 20 school boards which have race relations policies addressing issues such as streaming, curriculum, teacher training, handling racial incidents, school community relations and employment barriers to minorities and Native people. That's 15 to 20 out of about 185 school boards in Ontario.

The Ministry of Education is currently developing a model race relations policy and guidelines for all school boards in Ontario in addition to a race relations action plan for the Cabinet Committee on Race Relations. It includes addressing the issues of concern to the Native community in terms of what's happening in the school system. In addition, a few colleges and universities have or are developing race relations policies and the Ministry of Colleges and Universities is also required to develop a race relations action plan.

The Metro Toronto Housing Authority is the third largest housing authority in North America. It has about 125,000 residents in its domain. The public housing authority now has a Director of Race Relations and a race relations program in place to train all staff in handling racial incidents and so on. That initiative, frankly, is a direct result of the commitment from and initiative of the Cabinet Committee on Race Relations. It conducted a review of public housing and race relations, and out of that came recommendations to the Cabinet Committee on Race Relations to establish this particular program in the Metro Toronto Housing Authority. Now the Ministry of Housing is developing a race relations action plan for all public housing authorities in Ontario.

In the employment equity area we're not doing as much as the federal government in terms of having legislation in place. But the Ontario Public Service does have an employment equity program for women, racial minorities, Native people, disabled persons and francophones. Goals and timetables for each Ministry are to commence in September 1989, and there is a policy committee that's working on guidelines or policy options for employment equity in the broader public and private sectors.

I might add that the leading edge in terms of lobbying for change and pressuring the government for change in the area of employment equity has not come from mainstream women's groups, the disabled community, or from a number of other potential target groups. It has, in fact, been the visible minority community that has been lobbying for employment equity action by the Ontario Government. The Visible Minority Women's Coalition has probably been the most effective in terms of presenting their concerns about employment equity in Ontario and Toronto and taking the leadership in that role. I think we men can learn something from the effectiveness of that kind of a movement.

The Race Relations Directorate has a budget of about $2.7 million of which three-quarters of a million dollars was recently allocated through the Cabinet Committee on Race Relations. We also administer a $500,000 race relations project fund for community groups, Native organizations, municipalities and school boards to launch race relations training, public education programs, research and other kinds of activities.

The mandate of the Race Relations Directorate is the following. We develop, coordinate and monitor government-wide policies and programs of race relations of virtually all the ministries in the Ontario Government. We monitor racial tensions and we provide mediation and conciliation in terms of dealing with disputes. Well, we've tried to apply that particular motto in terms of mediation and volunteer dispute resolution in racial incidents, such as conflicts

between police and community, where there aren't any specific allegations of a criminal nature or whatever against the police, but there have been some concerns about police harassment, or the kind of services or lack of services available to Black communities and other visible minority communities. We spend a lot of time dealing with those kinds of issues, as well as dealing with the Native and non-Native issues that are emerging in the north where the backlash against Native people seems to be growing as they assert their rights for land entitlements and other kinds of aboriginal entitlements.

We also provide advice and assistance to municipalities, school boards, police, corrections, etc. on the development of programs and policies.

We conduct public education and training programs. I would like to provide a word of caution in the area of training programs. I recently saw a study conducted by a professor at the University of British Columbia, Charles Ungerleider, who did a survey and concluded that 43 percent of race relations training not only did not have a positive effect, 43 percent had a negative impact. In fact, it reinforced negative stereotypes of particular minority groups and gave the individuals who participated more ammunition for continuing on in their prejudicial and discriminatory behaviour towards those particular groups.

We've developed a first draft of a race relations training manual and we hope to extract from that certain guidelines so we can ensure that if there's training, there are some evaluative mechanisms to ensure that the right kind of training is going on rather than that 43 percent figure that I mentioned.

Racism is a fact of life in contemporary society. It's a part of our structure, part of our institutions, part of our way of life, and it's evident in all aspects of our community institutions and policy areas, including the criminal justice system, employment, education, housing, social services. To effectively address this issue, there is a need for a partnership and a will; there's a need for resources among governments, community groups and various key stakeholders such as unions, employees, etc.

I suggest to the Commission that the Provincial Government has a critical role to play in:

(1) putting its own house in order, and

(2) providing leadership to other stakeholders.

To assist in reaching those two objectives it is important that the Nova Scotia Government develop its own race relations or anti-racism policy, put together an action plan for the implementation of that policy, and ensure that there are appropriate reporting mechanisms in place to ensure that this particular policy and these action plans do actually succeed.

Following the morning sessions, the group then dispersed to five smaller workshops to discuss the ideas raised in the morning session. Reports from these workshops follow.

Reports from Discussion Groups
Workshop 1

Davies Bagambiire
Rapporteur

The discussion in our workshop opened with a very challenging question - whether there is significance in the fact that the panelists and the speakers of today had taken a different approach from the one taken by the panelists and speakers yesterday. There were different reactions to that question. Some members of the group felt that the difference in methodology or approaches may have been due to the fact that Natives, particularly the Nova Scotian Indians, have been isolated and, if you like, insulated on reserves, unlike the Blacks who have had to have direct day to day contact with the criminal justice system in the province. The speaker pointed out very quickly however, that that doesn't apply as a universal observation because some Native Indians live in urban centres, and, therefore, are not very different from the majority of the Blacks.

Another participant observed that there was a strong assertion among the Natives of what was referred to as collective rights which have been enshrined in the Constitution. The Blacks appeared today on the other hand to have been pushing for equality within the system and reformation of that system.

It was observed and pointed out as well that there were several areas in which the views of Blacks and Indians clearly overlapped. The speakers yesterday and today both strongly suggested that there has to be increased participation of Native and Black Nova Scotians in the composition of the various agencies of the criminal justice system in the province. Speakers on both occasions pointed to the desire to reorganize the police forces and to create a method whereby information would be freely exchanged between the police forces and Black and Native groups.

Having exchanged those views, our workshop agreed that the presentations clearly show that racism exists in Nova Scotia and Canada and, indeed, that racism exists in the criminal justice system.

The question then was how to tackle the racism that exists in the criminal justice system.

The first suggestion was that of appointment of minority judges to the bench. Someone questioned how this would be useful and whether this would necessarily require that Black accused persons be tried by Black judges. The answer was to say that the appointment of Black lawyers to the Bench need not necessarily mean that all accused Blacks appear before their Black brethren, but, rather, that

such appointments would serve to re-educate both the bureaucracy within the criminal justice system and everyone else that Black members of the Bench would be as effective and as capable as White members of the Bench.

Another participant suggested that, in fact, appointments to the Bench of Blacks would serve to deter crime within the Black communities because experience in the provinces such as Ontario has shown that Black judges tended to hand down much harsher sentences than White judges. That's a good reason to appoint Black judges, it was argued.

As a further solution to attacking the racism that everyone agreed exists in the system, someone suggested that Blacks and other minorities be allowed to participate in bodies set up to investigate complaints against any of the members of the various agencies that constitute the criminal justice system, including the police forces in particular.

We then moved on to another suggested remedy or approach which was the question of education of the Canadian society in general. This, of course, arises out of the recognition that there is a complete lack of understanding by the Canadian public at large of the difficulties that have been expounded in this forum and in our discussion. It was, therefore, argued that any other measures may not be sufficient if they are not accompanied by a massive program of re-education of the general public, who in turn would pressure the politicians to implement whatever recommendations may be handed down by this Commission. It was pointed out that the Commission has a big responsibility in this respect, and that the Commission ought to realize that their recommendations are likely to have a major impact.

We then moved on to a suggestion of increased recruitment into the police forces. We also had an additional emphasis on the necessity for multicultural education, both in police forces and in the legal system as a whole. One participant pointed out that multicultural education does not simply mean teaching a course in Native rights at the law school, but that it has to be part of the entire program, be it torts, contracts, or, indeed, property law, provided it's appropriately brought into the program as it progresses.

We then had a discussion about increased penalties where racially motivated crime is involved.

After that, we discussed access to law school as a way of improving or eliminating the existing racism in the criminal justice system. It was suggested that law schools should re-examine their admission criteria, particularly as they apply to minorities. It was pointed out by participants working at Dalhousie Law School that,

indeed, that law school is in the process of re-examining its admission criteria.

We then had the benefit of comments from a professor at U.B.C., who pointed out that the University of British Columbia has not dropped its standards, but rather, has admitted Native students on a discretionary basis, meaning that specific spaces have been reserved for Native students, but that once they get admitted into the school they then become part of the pot and they go through the school on the same basis and examinations as the rest of the students do. However, they do get special support by way of funding and special community support, meaning that they receive special attention that would assist them in whatever non-law school problems they may encounter and, of course, they have funds available so they do not drop out before completion of the programs.

The absence of a forum in this province whereby government representatives and the representatives of minority groups met on a regular basis to review the state of race relations in the province will make a mockery of any recommendations handed down by the Commission. Those recommendations could, in fact, go unheeded by the government and never be implemented. The Commission is asked to recommend the creation and the funding of a mechanism that would ensure that the recommendations of the Commission are, in fact, implemented.

Workshop 2

Carolyn Thomas
Rapporteur

Our main thrust was the recognition of racism in the system. The justice system must realize that there is racism in our society and that the system must be careful not to feel that it doesn't exist within the judicial system and not to assume it to be something else. To ensure that that doesn't happen, it was felt that the system had to acknowledge and then to deal with it in an effort to eradicate it.

How do we deal with it? Our group decided that policy is extremely important, and that a policy has to be set by government. A recommendation of that sort should go forward from the Commission.

It was felt that there should be use of expert witnesses in court cases such as sociologists, psychologists, historians, people who can shed light and help to create a greater understanding of the existence of racism.

It was felt that corrective measures must be taken in the education system, where a lot of racism exists. Government controls the education system and has to do something about the lack of understanding that exists within it, both with students, as well as teachers. For example, how many people really know the positive

contribution of Black people to our history? We need a special task force or commission or some kind of mechanism to look at the issue and deal with it head on.

There was much discussion on mandatory affirmative action programs and it was felt that, yes, those things are good, but there has to be strong laws that are put into place and accountability built in as well.

We went on to talk about education of people within the judicial system. It was pointed out that Bar Admissions Courses should be examining the issues of discrimination and racism, and the particular problems of minority clients.

We talked about human rights legislation. It was the feeling that existing laws are not addressing the problems, that they can and should be strengthened. In addition to that, perhaps there is a need for the establishment in Nova Scotia of commissions like the Ontario Race Relations Directorate.

We also talked about the establishment of some kind of a mechanism so that after today, after tomorrow, everything wouldn't be all over. It was strongly felt that commissions come and commissions go. Task forces come and they go. Recommendations are put into writing, but then that's the end of it. Therefore, we are strongly urging that a mechanism also be put into place so that an annual review of the recommendations can be looked at and we can find out how far we have progressed and what else needs to be done.

Thomas R. Berger
Chair

May I just, as a postscript, say that there are continuing education programs for judges at the federal level. There are schools for federally appointed judges such as the three Commissioners on this Commission who are federally appointed judges. Most provinces have schools for the provincially appointed judges.

Quite apart from whatever representations you make to this Commission, you are free to go to the Chief Judge of the Provincial Court in any province, including Nova Scotia, and to the Canadian Judicial Council, and urge that these programs be undertaken for those judges. I don't think that anyone will think that at all untoward. I think they would be most receptive. I only add that it may be that we cannot expect our three Commissioners here on the Marshall Commission to deal with absolutely everything that has come up here. But you are in a position to pursue those matters here or at the federal level.

Workshop 3

Dr. Wilson Head
Rapporteur

There was considerable interest in our workshop in the definition of racism by Ms. Thornnill. We certainly appreciate what she was saying this morning about this concept which is hardly understood by many, many people. What she did this morning was very useful in trying to put racism into what I'd call a more scientific type of perspective.

We agreed with many of the recommendations made by the speakers this morning. We talked about the training of judges. We talked about the fact of powerlessness among the Black population. We talked about the question of appointments and whatnot. We had a very strong plea that more Blacks and other minorities be appointed to boards, commissions, government agencies, etc., but not the usual type boards and commissions that have no power. One participant was saying very strongly that she wanted Blacks appointed to positions of power where they could have some impact upon government policy. Most of what we have today, as was pointed out, is tokenism, where one or two people are appointed.

A strong feeling came out in support of coalitions. The Black population is fairly small. It does not have a great deal of political power in the sense of voting power. Nobody said this, but I'll put my own interpretation on this. What they are saying, in effect, I think, is that we have to have the power to squeak. And it's the squeaking axle that gets the grease. And while you don't have numbers, if you squeak loud enough, that can carry some weight, along with, of course, education and other things of that nature which help people to fight for themselves. The coalition concept recognized that there was a need for other people. Not all people who are concerned about racism are Black or Native people. There are White people concerned. There are people from India and other countries, our East Asian, South Asian population and so on. There are Chinese people that are concerned. And there are church groups who are concerned. There are labour unions concerned, perhaps even some business groups.

Another aspect which received some discussion was the question of legal aid. We had a strong plea that legal aid had to be expanded in the sense that it should not just simply be handling cases. For example, the Dalhousie Legal Aid Clinic not only did the traditional legal aid work, but also went out in the community and helped groups organize and fight the system to protect their rights. This has been cut back. If the Nova Scotia government had had any real commitment, they would not have cut back a very valuable program which had already been cut back to the bone.

The final thing talked about was the question of the Nova Scotia Human Rights Commission. Everyone recognized that it is not given the resources to do the job that ought to be done. Furthermore, the job is too diffuse. It takes on the plight of the disabled, the plight of women, the plight of Native people, the plight of handicapped and so on, and, of course, race relations. The feeling was that there ought to be a council of some groups which focus entirely on race relations and that this group should not be an advisory group. It should be a group with the power, itself, to investigate, somewhat like an ombudsman but not covering all the ground that an ombudsman covers, focussing upon race relations. This was one of the strongest recommendations that came out of our group.

Workshop 4

Frank Edwards
Rapporteur

There was an acknowledgement at the beginning of our session that the Province should be commended for allowing an inquiry with the scope of this one and touching on the sensitive topics that we are discussing.

The group then moved on to the question of what will happen following the report by the Commissioners. There was a recognition in our group that as important, if not more important, as the content of the specific recommendations would be the creation of a mechanism which would ensure the implementation of those recommendations. That was variously labelled a policy framework or a policy statement. It was acknowledged that such a framework or statement would provide a means by which government agencies could be pressured to implement the recommendations. There should be a timetable set for such implementation and - and probably most importantly - the community must have the means to monitor and exert pressure regarding the recommendations. It was agreed that there should be a commitment by the Government to meet with Native and Black groups regarding the implementation of the recommendations that pertain to them. Those meetings should be specific and at regular intervals so that the very considerable work of this Commission doesn't become lost on the shelf somewhere.

The follow-up mechanism I referred to would be the on-record meetings between the groups and the Government. It was also suggested that another means of ensuring implementation would be to strengthen the mandate of the provincial Human Rights Commission.

There was also quite a bit of discussion about the existence in our institutions and through our society of racism and racist attitudes. And it was agreed that there was a need for a general educative initiative designed to modify that racist behaviour in the community.

In that regard, there was quite a bit of discussion about where racism exists and how best to eliminate it through the educative process. One speaker pointed out that there cannot be reform of the criminal justice system unless there is an awareness of the racist attitudes throughout the community. It was emphasized that to change attitudes and behaviour, what you're talking about is behaviour modification for an entire generation, both those who are in the positions now and those who will occupy those positions in the future.

Another area which the group wanted to commend to the consideration of this group and to the Commissioners was the suggestion that there be an evaluation every two years of persons involved in the criminal justice system. That would include everyone from police to lawyers to prosecutors to judges. There was agreement in the group that a monitoring committee composed of not only government representatives but also representatives of the Native community and the Black community be involved in the evaluation.

Finally, one of the members of our group mentioned, and several agreed with him, that racist behaviour is governed by the economic relationships which exist among various segments of the community. and these economic relationships will ultimately have to be addressed, either in concert with addressing the racial problem itself or when it is finished.

One member of our group made some comments which we felt should be shared with the larger group. The lady I wish to introduce to you is Dr. Carrie Best.

Dr. Carrie Best

Thank you so very much. It will be difficult for me to speak to you about my involvement in the pursuit of justice in the three or four minutes that I have been allotted. Memories crowd upon me, and I find it very difficult not to become emotional. Firstly, I say, Justice Berger, that I want to thank you so much for allowing me the privilege to address this body. Thank you so much. I see so many people here that I have been associated with over a period of 50 years, from all over this country - Lloyd Perry, Dr. Juanita Traoure, Dr. Wilson Head, Dr. Tony Johnson, Howard McCurdy. And suddenly I don't feel alone. I feel that all the heartaches and all the struggles and all the things that I have gone through have been worth it.

I want to say to you, Rocky, that I have never been as proud of any member of my race in my 85 years as I was of you today. I will not say that none of us could do better. I will go further than that and say that none of us could have done as well. As I said to you jokingly a little while ago, "You have come a long way, baby."

Forty-five years ago I had a small newspaper. And I came to Nova Scotia, just a young woman with a dream, to see if I could get a little advertising to help to pay for the cost of publishing that paper. And I stopped at a store on Barrington Street, operated by Mr. Manuel Zive. I went in with my little 4" x 6" sheet, and told him that I wanted just to have something to say about racial understanding, because things were not good. And he said to me, "You are just a small voice crying in the wilderness, but keep crying," and he went back into his office and he gave me a cheque for $50.00, which in those days was a lot of money. I thought today that I would give anything if Manny Zive could have been here today, to know that I am still crying in the wilderness, but I am not crying alone anymore.

I would like to ask the Commission if they really know the awesome power of the justice system in Nova Scotia. I am the widow of a World War veteran. I have the honour of having been made a Member and then an Officer of the Order of Canada. I have an Honorary Doctor of Laws degree from St. Francis Xavier University. I have so many awards and plaques in my living room that my daughter has promised to throw them out so she can see the walls. And I have come to the awful conclusion, as I near the end of my life, that there is absolutely no difference between Donald Marshall, Jr., a 17 year old Indian, and Carrie Best, Order of Canada, in the justice system in Nova Scotia.

If you really want to know what the justice system of Nova Scotia is in relation to Blacks and Indians, I will tell you. I consider that I am not living under British law. I am under the Gag Law of 1885 of the United States of America, an atrocious enactment that said, in essence, that no Black has any right that a White person needs to recognize and they cannot get justice in a court of law. In a sense, we have been living under the Gag Law of 1885 for 131 years, although long since abolished. And many may feel that this law has died. It didn't die. It limped across the undefended border of the United States into Canada. We live under a mind-over-matter government. We don't mind because you just don't matter. I know you're all familiar with the words of William Lloyd Garrison, the abolitionist in fighting slavery, which is just the mother of racism. (There is no difference between racism and slavery.) I recall his famous words: "I will not retreat. I will not equivocate. I will not retreat a single inch. And I will be heard." And that is my prayer. It may be my last that I'll ever make in public. But I will die fighting injustice.

I ask you, Commissioners, to join forces with us, with the power that you have, to bring this awful system of racism in Nova Scotia to an end by letting the Attorney General and the Premier and his Ministers know that we will no longer tolerate this injustice. We are human beings; we have fought for this country; we have built it; we

have made our contribution. And we will be treated as citizens.

I am terrified of the justice system in Nova Scotia. And I will not go before the justice system of Nova Scotia until this Commission tells me that I will be treated fairly. And I throw that challenge out to you, that you send that message out to them.

Thomas R. Berger
Chair

Well, I should say, on behalf of all of you, our heartfelt thanks to Dr. Best. I had the pleasure of meeting Dr. Best at lunch. And, of course, like so many of us from out of the province, I was well acquainted with her reputation and glad to see it confirmed here this afternoon.

We only have15 minutes. And may I, as Chairman, suggest that perhaps it might be appropriate and courteous, as well, to use that 15 minutes by inviting our four panelists to make some brief concluding remarks.

Concluding Remarks from the Speakers

Rocky Jones

I have really enjoyed these deliberations. I don't know why the Provincial Government ever got into it. I am sure they didn't know that all of this was coming. I mean, they couldn't have or they would never have allowed it. But I am convinced that the Commissioners will make the kinds of recommendations we're hoping they are going to make. So I am going to publicly thank them in advance.

Esmeralda Thornhill

I commend this Commission on their courage. It takes courage to touch or try to approach such an irritant subject as racism, which is the problem at the root of the Donald Marshall incident. I am optimistic. I feel that courage does not happen without commitment. And I feel that commitment rests on conviction. And I further feel that out of conviction and commitment comes the strength and the creativity that will bring about and generate the innovation necessary to fly over the hurdles. I do believe there will be hurdles. And with that in mind, I would just like to plant a seed. I really don't know what the format for presentation of the findings is. But I would like you to consider innovating a forum that, in itself, will validate and affirm the findings I feel are irrefutable. How it's finally presented in itself has educative value and political clout. And I think that that, in itself, can be significant and indicative of the importance you have placed on this subject and the depth of your commitment and your courage.

Thank you.

Dan McIntyre

I think that the Commission is to be commended for opening this particular issue up for debate, for discussion, for an honest and candid examination that, I think, is unprecedented anywhere in Canada at any time. The challenge before the Commission, before Nova Scotians in general, and for all Canadians, is to ensure that the work, the very elucidating and positive recommendations that are going to emerge from the Commission's examination of these issues, is not lost and doesn't gather dust on some shelf. That is the one thing that I am concerned about. I hope that we overcome that obstacle.

Bromley Armstrong

We made no new discoveries. We didn't re-invent the wheel. We did identify some of the problems. And we made some suggestions as to how to deal with some of the problems facing the Natives and Blacks in this country. It was encouraging for me to observe the outstanding leadership from my own community and from the Native community, and, particularly, the verve and commitment of all these outstanding Canadians that are present here. I think they are on the right track and there is some hope for this country.

Thomas R. Berger
Chair

Would you permit me just to say something that may be useful to the Commission and perhaps to others about what we have heard these last two days. The Commission was established because a Black person was killed and an Indian person wrongfully tried and convicted for the crime. There is a convergence, it seems to me, of interests so far as Indians and Blacks are concerned. Both have an intense and abiding interest in seeing that equality is not only entrenched in the Charter of Rights, but becomes the watch word of our dealings with our governments and between ourselves. Both are intensely concerned to put an end to racial discrimination in our society, its institutions and in its daily life.

Might I also just be permitted to say a few words about the discussion yesterday about Native land claims and Native self-government. Those claims arise from international law and our rights that the indigenous people, the aboriginal peoples, of our country and other countries enjoy. They are rights which are special to them. Sometimes when Indians seek to have tribal courts, people will say they are actually demanding institutions which are, themselves, racist. Why should one race have its courts and they are the only people who can get justice there? I take the liberty of putting that canard to rest, because, conceptually, it is unsound.

The reason why Indian people are entitled to institutions of their own is because they had those institutions and they were functioning as political institutions centuries ago, long before the Europeans

came to this continent. And the Supreme Court of the United States and our own Supreme Court have accepted that the aboriginal rights of the Indian people, the institutions deriving from their long-standing occupation of this continent, are political, not racist.

The Supreme Court of the United States has said that the reason why tribal governments do not offend the guarantees of equality in the Bill of Rights, are because they are political institutions, not racial. The Indians were here with their own political institutions before the Europeans came. They were all of one race. They cannot now be blamed if they still claim those institutions, having persisted for centuries as their own.

I take the liberty of mentioning that, because it seems to me that Indians and Blacks here in Nova Scotia and around the country are allied in seeking many common goals. And I shouldn't want them to find themselves at a disadvantage in an argument with others over what those very special institutions that we have acknowledged in the Constitution are the right of Indian people in our country. The intellectual foundations for the notion of equality, which has emerged and become manifest in our human rights institutions and our Charter of Rights since the Second World War and especially in recent years, are reflected in the international conventions to which Canada has subscribed. The very special claims that Indian people have in our country arise, essentially, from their indigenous occupation and government of this country before the Europeans came, and cannot fairly be described as racist in any way.

Could I just offer one or two remarks about Royal Commissions. because the suggestion has been made that we don't want to see whatever recommendations emerge from this Marshall Commission just put up on the shelf somewhere and left to collect dust. The suggestion has been made that the Commissioners would recommend a mechanism be established to see that their recommendations are carried out. Well, we cannot expect more from our Commissioners than they are entitled to do under the Constitution of Canada. They are purely advisory. It is for the Government of the Province in the end to make the political choices that have to be made. Our Commissioners can only recommend. In a democratic society that is the way it must and ought to be. But may I, as a veteran of a number of Commissions, tell you that, in my view, there are two aspects to the work of Royal Commissions. One consists of the work of public education. We're not just at these hearings educating our three Commissioners. We are engaged in the work of public education, educating each other and, through the media, the public. And that's a common feature of Royal Commissions in our country and a most important one. They leave their imprint, even if they never make any

recommendations, even if the recommendations are ignored by the government of the day. That, it seems to me, is something worth remembering. All across Canada, the work of this Commission is well known and has already made its imprint on the way we think about the justice system and its treatment of Indians and Blacks.

The second thing, of course, that Commissions do is write reports, and they present them to governments, and governments decide to do what they will with them. I think it's a bit of a myth to suggest it is commonplace for the recommendations of Royal Commissions to go on the shelf and remain unexamined and unimplemented.

I think the history of Commissions in our country is really quite the opposite. Medicare was, of course, pioneered in Saskatchewan in the late '50s and early '60s. But it was a Royal Commission, chaired by Mr. Justice Emmett Hall, that held hearings all over the country and recommended to the Government of Canada that we have a national medicare plan. And that, I think, is as good an example as you could want of the effectiveness of a Royal Commission and the way in which its recommendations have been implemented. Some of you are old enough to remember the '60s, when the use of marijuana and other drugs came to public notice. A Royal Commission was established under Mr. Justice Gerald LeDain. It held hearings all over the country. It served to bring to public attention, in the most graphic way, the dangers of the non-medical use of drugs such as marijuana and amphetamines and even cocaine. It served a very important public purpose in that sense. Even though none of the formal recommendations of the LeDain Commission were ever carried out, it still had a very big impact on the country.

There was a Royal Commission a few years ago on the status of women, headed by Florence Bird. That Commission's report contained hundreds of recommendations to advance the condition of women in Canada. All of those recommendations haven't been carried out. But it serves as a series of guidelines for women's groups all over the country. It is still a club with which they can beat the federal government and all the provincial governments.

And if I may just refer to the Ocean Ranger Inquiry that Chief Justice Hickman chaired, that certainly had a very great impact. It was convened jointly by the Federal and Newfoundland Governments on safety on these gigantic oil rigs at sea.

Could I just say that I headed three Commissions in Canada, two for the Federal Government and one for the Government of British Columbia. And the recommendations of all three of those Commissions were largely carried out by the Governments to whom I made the recommendations. I had the opportunity of heading a Commission in Alaska in the early '80s. I hadn't been appointed by

the Federal Government to do so, but I made recommendations to the U.S. Congress and administration, which they have up until now rejected. But I remain optimistic that the hearings I held in Alaska and the report I wrote, which has been widely read, have made an impact on the way people think about the issues that I was concerned with. Finally, in case any of you have forgotten, we had a Commission called the MacDonald Commission on free trade that handed in a report two years ago. And nobody can say that the MacDonald Commission has not had a very real impact.

3
Role of the Attorney General

November 26

Thomas R. Berger
Chair

We've spent two days considering the way in which the justice system here in Nova Scotia and, indeed, elsewhere has treated Natives, Blacks, and others. This morning, we are going to spend our time considering the way in which the Office of the Attorney General, which in every province of Canada is responsible for prosecutions, might be restructured to ensure that prosecutions are conducted fairly no matter how well connected the subject of an investigation or how poor or marginal the subject of an investigation.

Some of the issues that have been raised before this Royal Commission here in Nova Scotia are not unique to Nova Scotia and have led to proposals for reform in the conduct of prosecutions in other jurisdictions.

Professor John Edwards

Throughout Nova Scotia's history, back to colonial days, the Attorney General has been at the very apex of the justice system. So, indeed, has he been in the federal situation, the head of the Department of Justice, as the Minister of Justice and the Attorney General of Canada. It's an office which has an even longer history in England, going back to the 13th century. Despite this enormously responsible position, there is a significant level of ignorance, not only among members of the ordinary general public, but among politicians and lawyers - including members of the judiciary, the practicing bar and those of us who seek to teach the future members of the profession - of the strange but important series of duties and responsibilities attached to this office. If, in fact, we are to achieve through those who hold this office, and those who serve as agents of the Attorney General - whether they are Deputy Ministers or line prosecutors - an understanding of what are the essential qualities associated with this office, we have a very long way to go before we have public confidence that the incumbents will reflect those qualities of even-handedness, impartiality, resistance to political interference, and independence from the pressures that are a constant accompaniment of this particular office. Perhaps it's a reflection of

modern times, but if one looks across Canada, the experience that citizens of Nova Scotia have been experiencing in the last few years is, as Justice Berger said, not unique.

The adjacent province of New Brunswick saw fit to establish a Royal Commission with even wider terms of reference than this Royal Commission. It did not pursue its terms of reference, but the latent causes would be well understood and recognized by those who live across the border in New Brunswick.

More recently reports from Manitoba suggest that that province, likewise, is experiencing some of the turmoil of trying to ascertain what is expected and what is unacceptable in terms of the way in which discretionary power is exercised.

British Columbia has for some years not been an exception to the general rule that the enormous attention given to the manner in which the Attorney General and his senior officials conduct their duties illustrates that an enormous gulf exists between the conception of what this office demands and the realization of even the most basic tenants of the office.

In the United States, we are all able to recall the revelations that accompanied the Watergate hearings, and the activities of the most recent occupant of the office of the Attorney General of the United States, Mr. Edwin Meese.

You can come around the Commonwealth and discover that what has been occupying the attention of the Commissioners here in the Marshall Commission can be replicated in so many countries. Why is it then that the perception of the public falls so far short of the expectations. Those expectations are simple. They are a combination of even-handedness, fairness, impartiality, and an independence which requires some personal qualities.

I want to leave with you an indelible recognition of the fact that no matter what system is in place, the essential qualities are those of personal integrity, qualities of character, backbone, and an understanding of what this office truly represents.

I've described the duties of an Attorney General as requiring the agility to walk a tightrope. Few of those who come into the office have an understanding of what is expected of them, and little guidance is provided.

When I came to undertake a study of this office and of those related offices for the Commission, it became very apparent to me that one of the initial features that had to be recognized was the inherent problem of their duties in relation to the police, in relation to the appointment of the judiciary, in relation to the appointment of and supervision of Crown prosecutors, which in itself represented an inherent conflict.

I was pleased to see that in Nova Scotia, belatedly perhaps, the

Government has seen fit to take away from the Attorney General the duties and responsibilities of supervising policing in the province by creating a ministerial Solicitor General. That has been done in other parts of Canada and I believe it is an essential forerunner of other changes.

It is my view that certain other fundamental changes are called for. My remarks are not a criticism of Nova Scotia and of the system as it has been administered in this province. It is not that Nova Scotia is unique in this regard and it had to put its house in order where other parts of the country have been immune.

I don't think it's an exaggeration to say that the rest of the country is watching very carefully not only the discussions, but also what results from this particular Commission. There's a great desire to see whether the models that may come out of this Commission have an application. Nova Scotia, as a single province, simply represents a whole body of experience that can be replicated directly in all the other provinces. Consequently, whatever changes may be recommended by this Commission are more than likely to be the activating force in producing parallel measures in other parts of the country.

One aspect of the Attorney General's office which I think needs to be understood is that under our system he's an elected politician. He's a member of the House of Assembly and a member of the Cabinet.

We also, historically, accord to the Attorney General responsibilities as the guardian of the public interest. The provincial statute enumerating all his duties and responsibilities declare that the Attorney General has the statutory, constitutional duty to see that all actions of the executive branch and of the legislature conform with existing law. The Charter of Rights has, in dramatic fashion, re-emphasized that primary responsibility of the Attorney General to insure that the rights and freedoms enshrined in the Charter of Rights are his paramount responsibility. This reflects the ideals of the office. Clearly, seeing the Attorney General as an avid, active politician on the floor of the House of Assembly and in the hidden sanctum of the Cabinet deliberations does create difficulties in the minds of ordinary citizens. How can you reconcile these two expectations?

If we removed the Attorney General from elective office, from being a member of the Cabinet of the government of the day, could we, by one stroke, achieve the necessary reforms to bring about those ideas I've described? It's a very attractive, but I think a rather dangerous proposition to subscribe to, without realizing, as with all questions, that there are two sides to the coin.

I espouse with greatest emphasis the need to insure the independence with which the Attorney General discharges his responsibilities. At the same time, I would argue that if the person

who holds any office that carries with it such immense responsibilities as to the kind of society we live in is not held accountable to the legislative body and to the community at large, you may achieve much by way of independence, but you would lose an enormous aspect of the accountability of the office.

I do not see in the transformation of the office of Attorney General into a public non-elected office, the solution to many of the problems that Nova Scotia has experienced. I do believe that there are certain other changes we can make. In the series of opinions that I've prepared for the Commission, I review the experience in the United Kingdom, in England, in Scotland, in Northern Ireland and in other parts of the Commonwealth. I've looked at the United States and I have come to the conclusion that, yes, the time has come where we have to give serious attention to establishing a statutory office of a Director of Public Prosecutions.

Each of the provinces already has, in effect, that job, if not the title. He may be the Director of Crown Prosecutors or the Director of Public Prosecutions.

Don't be misled by that title into believing that once you've conferred that title, that you have somehow contributed to the solution of these problems. A Director of Public Prosecutions who is a government servant under the direct supervision and control of his superiors is not what I am suggesting that the Commission examine and adopt. I am suggesting the creation of an officer of public prosecution who is largely independent by virtue of legislation and who enjoys a status analogous to that of a Supreme Court judge, with a degree of security of tenure, that provides the insulation very necessary to protect against some of the more insidious and less apparent influences that are constantly exerted against those who discharge the duties of prosecuting. In this conception, the duties, powers, functions, and responsibilities, the level of accountability, the direction of accountability, the nature of the independence associated with the office are all spelled out by statute.

There are, of course, questions which must be answered. To what extent, where you have a statutorily independent director of prosecutions, should an Attorney General, as the Minister accountable to the Legislative Assembly, have a right to become involved in individual cases? That is one of the critical questions.

To be accountable implies that you should have an ultimate power of disposition or control, with respect to the office upon whom independence may be granted, but not total independence.

You can go the route that many of the Commonwealth countries have chosen. In Jamaica and other parts of the Caribbean, the office of the Director of Public Prosecutions is enshrined in the Constitutions. Some of them have seen fit to confer upon this office

the powers to discharge the responsibilities without being amenable to any direction or control from any other person or authority. They have total absolute independence. There is no accountability.

I find that unacceptable. It runs counter to my adherence to the view that our system of parliamentary democracy requires that everything that's done in the name of the state ultimately has to be accountable to the legislature through a particular minister of the Crown. Nevertheless, that model does exist.

I do not envisage that an Attorney General may have to interfere or seek to influence the decisions made by the Director of Public Prosecutions and those who serve under the Director, the line prosecutors, in a general manner. It ought to be the most basic presumption that an Attorney General and his Deputy avoid any desire to become involved.

Nevertheless, there may be exceptional cases. This morning, I was reading about Alberta where the Premier and the Attorney General and the Lubicon Indians are now faced with the question of how to deal with contempt of court charges. The Lubicon Indians are threatening to withdraw completely from the negotiated settlement of their problems unless the contempt of court charges be withdrawn.

These are the kind of pressures that in difficult circumstances raise their head and have to be addressed. You must have very clearly defined principles upon which the system functions, if you are going to succeed in adhering to the twin principles of independence and accountability.

For my part I would see it as an extraordinary, exceptional situation in which an Attorney General might become involved and give directions. He should be required to do so in writing, and those instructions in writing should be tabled in the Legislative Assembly, and published through the official *Gazette* so that the general public, which is the ultimate body of accountability, has the opportunity to ask itself if the circumstances were such as to justify that intervention. There may be a balancing of considerations where the ultimate test is, 'was this necessary'? Was it wise? Was it imperative? Was it justified? The only way you can do that is to ensure that the facts are on the table and a judgement can be rendered by the ultimate tribunal, namely, society at large.

The changes that I would hope to see introduced into our system of prosecutions in this country will be enhanced, provided this balancing of the respective principles is reflected in the kind of system that I've been seeking to advocate in these opinions for the attention and consideration of the Commissioners.

No matter what system is in place, there has to be a better understanding of the expectations of what the office requires. We have a long way to go by way of educating everyone as to the

extraordinarily important nature of this office of the Attorney General. The creation of a statutorily independent Director of Public Prosecutions, I think, will go a long way to restore the perceptions in the public mind that the system is, indeed, committed to those ideas that I've described and, it is hoped, the choice of individuals to occupy this kind of office will reflect these expectations and will not be something that can be continued simply to maintain the *status quo*. Fundamental changes are called for, and I think the time has been reached in which those changes should be implemented.

Thomas R. Berger
Chair

In every province of Canada, responsibility for launching criminal prosecutions resides with the Attorney General, ultimately. He may delegate that function to the Deputy Attorney General or his Director of Criminal Law. In the end, however, those responsible for launching prosecutions or not launching prosecutions are really employees of the Attorney General and are perceived to be often not in a position of independence. The fact that the Attorney General has ultimate authority to determine whether a prosecution should be brought or not may lead the general public to believe that these things are not done fairly.

I recently met John Cowdrey, who is the new Director of Public Prosecutions in the State of Victoria in Australia. In the State of Victoria, they had a series of continuing controversies, not unlike the controversy you've had here regarding the Donald Marshall affair, and there were allegations of corruption in the Office of the Attorney General. A great many allegations were made that the system was not dealing fairly with well connected persons or with persons with no connections at all. The State of Victoria went very far, farther than Professor Edwards would go. They established an office of Director of Public Prosecution. Mr. Cowdrey holds the office. He is given the same tenure as a Supreme Court Judge. He has tenure until he is 75 years old. He is in the Attorney General's Department, but he has the ultimate responsibility to determine whether a prosecution will be brought and the Attorney General cannot give him directions in the matter. He can't be fired by the Attorney General. The Attorney General can't interfere with him in any way. He makes his report to the legislature. And there you have a model that gives the authority for launching prosecutions to someone who is quite independent of political interference or political influence.

I was talking to Judge Coutu yesterday about that and he said, "Well, that's pretty dangerous, isn't it? Because if you have the wrong man or woman in that office, you couldn't get them out. The only way you can get rid of them is through impeachment."

It shows how delicate and difficult it is to draw the balance.

Richard Vogel, Q.C.

I was the Deputy Attorney General for six years in British Columbia. These very difficult positions are fraught with difficulty. The real problem is that it really didn't matter what decision you made in a controversial case, you were going to be criticized.

Perhaps the best example of that was the Clifford Olsen case. You're all aware that Clifford Olsen ultimately pled guilty to a series of murders, mostly of children, and in some cases, there were sexual overtones to the deaths of some 11 children. We were faced with a situation, administratively, that we could not possibly prove murder in any one of the cases. The most we could have probably accomplished, after Clifford Olsen had been arrested, was a conviction for impaired driving. I won't go into the background of that, but I will tell you that we agreed to pay a very substantial sum of money to Clifford Olsen's then wife. (Although she was technically his wife, they were separated and they were divorced very shortly after.) It was probably the most controversial decision of the term that I had while I had my office.

But the interesting thing in retrospect was that we knew when we made the decision that we would be criticized whichever way we went. To that point, the payment of substantial sums of money to informers and to those who had the necessary evidence that was required for a conviction was relatively uncommon.

It's a very, very difficult area. There were seven of us in the discussion, including the Attorney General whose decision it was. The whole discussion took two hours. About 30 to 40 minutes of that two hours was devoted to determining whether or not we would bargain with Olsen with the sum of money he demanded or the equivalent, to get the evidence we required to prosecute him for murder. The rest of the two hours was devoted to how we would announce and implement the decision.

The Attorney General was Allan Williams. We set out in the balance of that two-hour period a whole course of conduct for him to pursue. The first thing was that the negotiation group had to be set up and that was, in fact, assumed by the Department of Justice, the federal lawyers, with the RCMP. The money was ultimately paid by the Province and the responsibility for the decision was that of the provincial Attorney General. Allan Williams then went to all of the media individually, over a period of three days. Now the wrinkle here was that no announcement could be made until Olsen's trial was completed. There were two messages that Williams carried. One, this is what we've done. You can say nothing about it until the trial is completed or we will prosecute you for contempt. It's absolutely essential that Olsen get a fair trial.

My memory is the decision was made in late August, early September. The trial collapsed on a plea of guilty in January or

February. So the press and media had about four or five months to scurry around and prepare their attack, and attack they did. It was an extraordinary media assault on the exercise of a prosecutorial discretion.

Historically, when one looks back at it from this perspective, that really was a very important process for me to go through to understand what it is that we're talking about when we're talking about the the very extraordinary delicacy of the office of the Attorney General, the requirements of character, the requirements of strength, the requirements of a value system in an individual who served as Attorney General. His ultimate responsibility, of course, to that particular office more than any other provincial office in matters of integrity and conscience, is to protect the integrity of the institutions that fall within his ambit of administrative influence.

We're talking about the things that we're dealing with here today - the question about the integrity of the justice instruments in Nova Scotia - I think we must all accept that the minority groups, whether visible or not, must first of all have adequate housing, food, a health system, educational opportunity, and all of the things that go with the keeping and the preservation of a life that we've come to appreciate and expect as Canadians.

But when we get to that point of sustenance and survival, surely we must expect that the justice institutions of each of our provinces retain their integrity in these very difficult decisions.

I leave to the Commissioners the question of whether or not the system in Nova Scotia has met the test. In our discussion group, particularly yesterday, there wasn't a single person in the room who was prepared to concede that that was the case. I got the message from those who reported on behalf of their discussion groups that that was more or less the position of each of the other discussion groups.

What we're here talking about, first, is the recognition of a problem. If this Commission, in the course of its debates and consideration, comes to the conclusion that the justice system in Nova Scotia has failed, they must then characterize that failure. If they characterize that failure as racism or anything equivalent to that, that will be an extraordinary advance. The problem has been recognized and it's been dealt with by an authoritative tribunal which has quite deliberately taken the time required to sift through an extraordinarily complex series of patterns.

When I come here and sit and listen, particularly in the discussion groups, I feel the heat and the venom and the anger. I really am terribly concerned for the responsibility that you, as Commissioners, have. The recognition, if it should come, has to lead into some sort of deliberate categorization of mechanics. What's to be done?

John Edwards has given us an option. Do we 'rigidify' the system? Do we continue the existing system? Must we have some kind of mechanical process for the vetting of qualifications, for example, for the Attorney General or, for the Director of Public Prosecutions? There were interesting suggestions yesterday in respect of what Rocky Jones expected from the Ministry of the Attorney General in the routine administrative process of selection of prosecutors for the individual cases. I don't expect you, as Commissioners, have to get down to that level. My expectation is that you will be dealing with the bigger roles, the bigger jobs, and the saddling of the expressed and positive responsibility to exercise the conscience of the government of the day through the office of the Attorney General. What security can we have on a day-to-day basis that that conscience will be honourably discharged in accordance with the traditions of this very historic office that John Edwards has talked about so knowledgeably in his books and his talk today?

I thought I would talk for a moment about the changes that have taken place in British Columbia, how it came to pass that they were made, with a view to illustrating that such changes take a great deal of time, a lot of effort on the part of a great many people, and more importantly, a sustained political will.

We started out in British Columbia in 1968 or 1969. The Bar was very concerned about what they considered to be the breakdown of the administration of justice in the province. The Bar appointed a Committee under the Chairmanship of Tom Berger. My memory is that there were 25 or 30 lawyers who worked on this committee a long time. I very distinctly remember a meeting in 1971 or '72 with the then Attorney General, Les Peterson, at a Bar convention. We presented our report to him and we put a price tag on what would be required. Well, the result was that he did absolutely nothing. The further result was that there was also a change in government.

The succeeding government, the NDP Government under Dave Barrett, did a great deal. It was a revolution. They appointed a new Deputy Attorney General, David Vickers, who was a direct appointment from the Bar, and David was the perfect appointee. He had been directly and indirectly involved in a lot of the ferment in the Bar, was very cognizant of the agenda that the Bar wanted, had some comprehension of what was required in terms of academic study and assessment, and set about the job very deliberately. He created a Crown corporation, if you like, and filled it full of thoughtful people. It produced a whole raft of recommendations as to how the system would be changed. And changed it was. David was the Deputy for four years. He had fundamentally and radically changed the administration of justice in the province of British Columbia.

When I came in as Deputy Attorney General in 1977, there were some 5000 people directly within the Ministry. The organization was not clear. There were a lot of muddied lines and a lot of muddied responsibility. But the fundamental changes had been made.

Let me just go over them very quickly. There had been a fundamental role change for the Attorney General in that he expected a regional prosecutorial system to be in place. The Deputy had a fundamental change in that he had to put in place that regional prosecutorial system. The Attorney General had accepted the responsibility for what we call "professionalizing the provincial bench". It had been a lay magistracy prior to this. He implemented all of the changes required to retire the lay magistracy and to appoint qualified lawyers on a province-wide basis. The prosecutorial responsibilities, in additional to being regionalized - some ten regions across the province - were professionalized as well. The political patronage process was withdrawn completely. That jurisdiction had been exercised by the deputy prior to David Vickers' tenure on effectively a political basis, as had the appointment of the magistrates been exercised, essentially, on a political basis.

When I arrived, what was in place, effectively, was a professionalized magistracy, a regionalized and professional prosecutorial structure, working under administrators across the province, and it had a very dramatic effect. It bucked up the police. It really did change in a very fundamental way the administration of every courtroom in the province. The police were no longer prosecuting. There were court reporters at the provincial court level right across the province, which was an absolutely incredible change. The police didn't like it one bit. They muttered and carried on about it over many months and years about the loss of the ability to decide which cases went forward and whether or not a prosecution would be laid. And they're still at issue on that point.

These changes in terms of recognition took from about 1970 to about 1978-79 to be implemented. We didn't use any statutory enacting resources to effect these changes. These changes were implemented really by administrative fiat. But the general philosophical thrust of these changes was essentially a political decision by the NDP government that held office from 1973 to 1975. No changes were made by the succeeding Social Credit Government. We always had a fiscal problem, but when I took the office, I took the office as, so far as I was concerned, an independent person. I was not a political supporter of the government of the day. I had no expectation of being treated in that character by anybody to whom I was responsible. And I was very fortunate in the strength of character and the professional will and dedication of the two Attorneys General I worked for initially - Garde Gardom and Allan Williams.

I have this background when I come here today to deal with John Edwards' proposals in respect of the Director of Prosecutions. And he's absolutely right. These changes have to happen.

I recall dealing with Ian Scott at the time that he was trying to decide whether he would be the Minister of Health or the Attorney General after the Liberal success in Ontario. I was in touch with him and I said, "Look, the revolution that took place in British Columbia has to occur in Ontario. It's absolutely vital that that revolution occur under the administrative charge of a knowledgeable and competent active practicing lawyer. It has to be non-political, it has to be thorough, and it has to happen."

I say the same thing to you today. If, in fact, there is a recognization of a breakdown and a failure in the system in Nova Scotia, then there must be the mechanics recommended for the implementation for the change to ensure that that doesn't happen again.

When it does happen, it reflects on the whole country. When the ticket scandal broke in Winnipeg, that really affected, in my judgment, the administration of justice right across the country. There are a lot of people who are prepared to believe, with some cynicism, that the institutions do not work with integrity. When there are scandals in respect of the institutional fabric of the administration of justice, it affects everyone, not only the professionals whose responsibility it is to run them, but those who become involved with those institutions and worry about whether or not they're going to function in a nonpolitical and professional manner.

It was put very well to me when I was arguing salaries for the provincial court bench with the Premier. And he finally said, "You know, you're right, the last thing in the world an accused person wants to think about when he's standing in front of a provincial court judge is whether or not that man is worried about his salary." He didn't do much about the salary levels, I've got to say, but he put it very well.

I heard a Vice-Chancellor from England say, "Look, the most important man in the courtroom is the one who is going to lose. When he leaves that courtroom, what is he going to think in the moments after that experience about the adequacy of his hearing?"

The most important person in Nova Scotia is the person who will deal with the institutions of justice in this province after this Royal Commission has made its recommendations. Will those concerns that I felt yesterday in the discussion be placated? Are they going to be resolved? I don't know. One hopes, and that's why we're here.

Morris Manning, Q.C.

The background that I bring to this conference is not merely that of a defence counsel. In the summer of 1964, I worked as a summer student in the Ministry of the Attorney General, then called the Department of the Attorney General for Ontario. In 1965 and 1966, I articled for the Attorney General of Ontario. And from 1967 to 1976, over nine years, I worked as Crown counsel and, ultimately, senior Crown counsel, head of civil litigation and legal advisory services.

Since that time, I've been in private practice and have seen, therefore, the system from both within and without. So my observations today bring me to where, after almost 22 years in practice, I'm familiar with the criminal justice system and how it operates and how it's supposed to operate.

A lot of information about how it's supposed to operate came to me from two sources. The first was the people that I worked under at the Ministry of the Attorney General, Bill Common and Bill Bowman. They held the post of Director of Public Prosecutions. Even though it was not a statutory-type post and even though they were civil servants, they held the ideals that one finds expressed in papers and books written by John Edwards.

The other area where I was able to go and find out what an Attorney General was supposed to be and what he was or wasn't, was John Edwards' books.

I say that not to pat myself on the back or to show you that I'm well qualified to speak on the subject, but to give you some idea of the background that brings me here and why I was so pleased and honoured by the invitation from the Commission. Surprised, because it's an unusual and very bold step for a Commission to take. I view what they have done as being of critical importance to the justice system in this country. I hope that their recommendations will provide a model for the whole of the country. I deeply hope that their recommendations will not be put into never-never land by each provincial Attorney General because it's not on the political agenda. I deeply hope that some day the justice system will get the kind of financial support it has never had in this country. I deeply hope that we will have Attorneys General in positions, be they political appointees, be they elected, be they put into a new position or an old position, who realize that the justice system in this country is not working, and that it doesn't help those people who are being discriminated against. Ultimately, those people are the poor. The justice system will always work as well as it can work for those who can afford to pay for the best lawyers. It doesn't ultimately work for those who can't, notwithstanding our legal aid schemes. It doesn't work when we have an Attorney General who takes the job and says he'll change the system, who doesn't change it at all. It doesn't work when the Attorney General can't convince his Cabinet colleagues to

spend the kind of money that is necessary to pay provincial court judges what they should be paid so that the best people are attracted to the job, or to pay Crown attorneys the best that they can be paid so the best people will stay in the job. Ontario has lost more experienced Crown attorneys in the last few years than in the past 15 before, and that creates real practical problems in administering justice. Young lawyers don't have the experience necessary to deal with sensitive cases in a proper way. They're afraid to make decisions for fear of being overruled or overturned in the back room.

The Attorneys General in this country are married to the political system. They're tied in to constituents. That's a pragmatic and realistic fact. And so long as you have an individual holding government office who must go back to the people, who must be re-elected in the same way as anyone else, and who is identified and closely connected with the Cabinet and with the government of the province or the government of Canada, that individual can never be said to be independent.

We must have a system of accountability. There's no question of that. Young Crown attorneys prosecuting sensitive cases in the provincial courts at all levels of court in the provinces must be accountable to someone above them, because we have to have recourse. We have to have accountability.

It's my view that we must have change in the system. The system is not working. The question then becomes, what kind of change should we opt for - the model that's been put forward by Professor Edwards or the model that's been put forward by Professor Stenning? I have studied both, not for very long, but I have thought about both, against my background, and I cannot see how we can change this system by further marrying the Attorney General's position into the cabinet. I think we must divorce it from the cabinet. I think we must opt for a new system, which is separate and independent from cabinet influences.

We must recognize as a matter of practical political reality in this country that there are no votes in the justice system. There are no votes for those who advocate higher pay for judges, because people think judges are paid too much anyway. There are certainly no votes for advocating higher pay for lawyers who are on government staff, because they're viewed as being at the government trough. There are no votes for building new and better courthouses because, after all, the only people that are going to go through those courthouses are criminals.

So who is going to vote for the justice system? When it comes time to slice up the provincial pie, the justice system is always at the bottom because we, as Canadians, have not yet demanded high quality justice. Because we haven't, we're getting the kind of justice

system that we deserve. We don't really deserve it, but we're getting it because our political leaders haven't the gumption to call for more resources.

Unfortunately, I think that Philip Stenning's work doesn't have that degree of pragmatism or political reality as its basis that Professor Edwards' does.

I worked for seven Attorneys General over a period of almost 12 years, as a student and as a lawyer, and I saw things that surprised me, because I didn't understand them, and things that surprised me, because I did. I saw pressure being put on governments to withdraw charges against cities for pollution offences. And at the time, as a young lawyer, I was asked to withdraw an appeal that I had launched as Crown counsel. And I refused, because I didn't think what was happening was correct. In retrospect, and after the fact, a lot was explained to me that should have been explained to me at the time. There was plea bargaining, but it was being done at the wrong level. And I was ordered to withdraw the appeal. I said "no." Another Crown was asked to go out and do the job and did it.

I also saw appeals being taken in order to support a local Crown attorney, who was having difficulty because the judge sitting on the bench was always ruling in favour of his nephew defence lawyer, and no one would do anything about it.

Whether that was a proper reason for appealing a case in order to show that the system was wrong remains to be seen to this day. I wonder how fair that was to the particular accused. I didn't think it was unfair at the time. I wonder what that accused would think.

I saw an appeal taken of a sentence handed down in Northern Ontario with respect to Native people, which was viewed as being too harsh. And I saw the Court of Appeal consider the matter in a way which I had never seen before from a really pragmatic, practical, everyday, reality way and lower the sentence because they knew about the situation in the community.

In order to deal with that kind of situation, it was my feeling at the time that the almost independent office of Director of Public Prosecutions should be operating away from the political process. I had not yet had the experience I have today nor the learning that is based on Professors Edwards' and Stenning's works in order to help me formulate my thoughts on this subject.

But having formulated thoughts on this subject, I look around and I see great legal issues that come before us as a people, and I wonder why Attorneys General act or refuse to act under certain conditions. Let me highlight a few. The Meech Lake Accord is felt by a lot of people in this country to be seriously flawed because it endangers the rights of women and Native peoples under the Charter. There's a very serious question of interpretation of the Meech Lake Accord, yet the

governments refuse to put those serious, legal questions, constitutional questions, before the Courts of Appeal or the Supreme Court of Canada because the governments themselves agreed with the Meech Lake Accord. That, to me, highlights a situation where an independent Attorney General, or prosecutor, or Director of Public Prosecutions, or whatever you call the office, would operate in the way that was in the best interest of justice and law and not merely politics.

On the other hand, the Ontario Government got itself out of a very neat political problem with the Catholic school funding case by placing that before the Ontario Court of Appeal. Kicking the political football, as it were, into the Court and saying to that Court, "Here, you solve our problems for us by giving us your interpretation."

The abortion issue raises the same kind of concern. It's a political football, as we've all seen in this country, politicians are cowards when it comes to the issue because it has done a lot of politicians in, and yet some Attorneys General have not acted properly. For example, in the province of Quebec in the *Morgentaler* case, the continued prosecution, notwithstanding acquittals and the continued harassment using the legal process, raised great questions in the minds of Canadians not about Henry Morgentaler, not about the abortion issue, but about the abuse in the justice system.

In Ontario, after the jury acquittal, the decision whether to appeal was that of the Attorney General, Roy McMurtry. Now, I am sure that Mr. McMurtry, knowing him as I do, agonized over that decision, but I am also certain, without knowing any facts, that he did not make that decision totally on his own because the decision had great ramifications in society. And that's the kind of scenario that we're going to run into more and more with the advent of the Charter of Rights.

Because the Charter controls government, both at the legislative and executive levels, someone has to place the case before the Court. Someone has to prosecute, and when the defence lawyer in the criminal case raises Charter rights and says, "We are saying that legislation is unconstitutional," the Attorney General, ultimately, bears the responsibility for what decisions are made as to whether or not, for example, that particular argument should be agreed with.

You cannot have an Attorney General make those kinds of decisions with respect to the propriety of government acts, executive acts, legislative acts, and be part of the government acts and legislative acts at the same time. That's clearly a conflict of interest. It's clearly a lack of independence. While there's political accountability in the system, the political accountability is obviously through the political process, and we must be realistic about that process.

Those who go through the justice system, those who are poor and economically disadvantaged seldom have time, and almost never have money to be able to participate in the political process as we see others participating. They can't support a political candidate. They can't take time to knock on doors, and they haven't got the money to take out ads in the papers.

As a result, we must be realistic about who has access to the political system and, at the same time, we must see where the Attorney General's role comes in that system. If the Attorney General is part and parcel of the political system in the same way as his cabinet colleagues are, then we've got a problem in this country, and it's never going to go away.

We see a model, in effect, in the House of Commons or in the legislative assemblies where the Speaker of the House, who's supposed to be an impartial arbiter in the House of Commons or in the legislative assemblies, is part of the political process in a sense and is elected by the people at large. So we already have built into our system a kind of a model wherein someone runs for political office, has a constituency, gets to be elected and then is supposed to exercise quasi-judicial type functions, is supposed to be fair and impartial as between a number of competing political parties.

And I'm sure that with some thought and with the help of people like Professor Edwards, we too can map out a new truly Canadian solution to a Canadian problem. We don't have to slavishly follow the English model or the Australian model, although I was pleased to hear that the Australian model provides not only for security of tenure like a Supreme Court Judge but also pay like a Supreme Court Judge.

We have a lot of problems in this country created by the Charter which is there to help us. *Operation Dismantle* informs us of our view of the role of the courts today, and it's totally changed. It's changed because the courts review what the legislative bodies do and what the executive branch of government does, what the police do as part of the investigative arm for the executive branch. That's all up for review now.

The conclusion I bring is that, first, discrimination does exist in the justice system as a whole against those who are poor and can't swing political clout. Second, discrimination can be dealt with if we separate out the prosecutorial authority from the political process in such a way as to ensure justice and fairness and independence along with the necessity of accountability. Third, Phillip Stenning's view, while I admire him and his work greatly, is not appropriate, based on my experience.

Times have changed greatly. Crime is different - for example, there are now money laundering offences you never heard of before.

Methods of detection of crime are different - wire tap evidence, terrorism offences and so on. The defences have changed dramatically; we've constitutionalized both the process as well as the substance of the criminal law. But what has not changed, what has not kept up with the times, is the prosecutorial system and the role of the Attorney General.

It is time for a change. Why do we not view it in such a way that we can try it, and if it doesn't work, we don't have to stay with it. Why don't we build in a sunset provision in our new model. After all, Canadians like to look at precedent. We don't like to move too quickly. We've now got a precedent in the Charter of Rights. The override provision, which allows government to take away our rights for a period of time, is confined to five years at first instance and then five years again. We could put in a new model and have it go out of existence after five years or ten years and then renew it upon a restudy of the situation. If the situation has worsened, we'll try something else or go back to our original system. The advantage is it will take away the uneasy feeling that many have expressed and that I have had for quite some time that either we have a political decision being made in important, high-profile, political cases such as *Olson*, the *Morin* case, the *Morgentaler* cases, or we have the feeling that the whole system at the lower end, where there's not this high political view, is being run by people who are civil servants who don't have accountability to anyone. Either view makes us uneasy and should make us uneasy.

In closing, let me say that, having started the process, Mr. Commissioners, I truly hope that you will continue it, and you will put in your report a model for the whole of Canada which will be framed in such a way as to be a challenge to any of the governments not to implement it.

Serge Kujawa, Q.C.

I found the past several days very interesting. I think what we were doing, without maybe even thinking about it, was attacking the whole basis of a democratic system of living. According to my understanding of democracy, and it's a long way from very perfect, democracy is the will of the people, it is the rule of all of us, but it's under the rule of law.

Since that is what governs our whole system, the Attorney General, who has been responsible for law, is an extremely important person in the scheme of things.

All of the speakers so far, and I heartily agree with them, point out that whoever is administering the law is accountable to the public because, after all, the public is the final government. If you're representing them in dispensing justice and making laws and dealing

with laws, you have to be responsible and accountable to the public.

But can you be accountable to anybody if you are stripped of your powers? That's my number one question and Professor Edwards, it seems to me, is saying that since the Attorney General is a human being and, therefore not perfect, we should split up his jurisdiction into bits and pieces, and that way he can't do too much harm. It also follows that he can't do any good.

I suggest that we've equated progress and change, and we get our idea of the direction in which we should change from the United States. The United States is famous for due process. If it isn't done according to due process, then it isn't good and it isn't wonderful. We don't give a damn about justice, and we don't care about accountability. If there is due process, what else can you ask for? But in a democracy, if you want your government supported, if you want your Attorney General supported, then he had better convince the public that what he's doing is a sensible and just job and not simply that he is going through due process.

Now the government isn't running the country because it doesn't pass the final laws. The Supreme Court of Canada makes the rules and they apply the Charter. That has nothing to do with justice. It depends on whether due process has been followed. This is hard to sell to intelligent Grade 11 kids. And I suspect that's about the level at which the vote comes down; it's not going to sell too long, generally.

I think we have to get back to where the Attorney General can say, "Here is how the system runs. We are a democracy, and I am willing to have you judge the way I do things." Unless we're doing that, we're not even in a democracy.

This saying that 'justice must appear to be done' is one of the really sacred things in our law. But if you and I are married to a pair of sisters, does that mean when we go into court on the opposite sides of a case, that we have to act like we hate each other? Isn't it a simple fact of life that any human being can understand that if you and I, or if the judge and I are old friends and we golf together, before appearing before that judge, I'm going to prepare a little more carefully, and I am going to show a little more integrity because I want him to like and respect me, more so than I would with a total stranger. Why do we totally ignore that? Why must we make it all look artificial and, therefore, justice appears to be done? That is giving the public too little credit for intelligence.

Professor Edwards said something that I picked up on because it is so seldom that you hear anyone say it. He says that the Attorney General must show a great deal of "integrity" in the application and the administration of justice. I couldn't agree more. But mostly we don't hear a word about that. What we hear is what we get in from

the United States. Winning is not the important thing; winning is the only thing. Nice guys finish last. Who cares about integrity?

We cannot sever the administration of justice from society as a whole and unless society as a whole takes on the Edwards' formula based on integrity, nothing but nothing will work. We're not working on that, and although Morris Manning points out that everything has changed and that we have computers now where we used to have ball point pens, I don't see that humanity has changed much in the last 5000 years.

In terms of practicalities there's a suggestion that the Attorney General should not be involved in policing because, after all, that gives him too much power. We should have a Solicitor General in charge of that. That's being done in a great many places. My question is, how is the Attorney General to be accountable? The answer is, well, he is accountable as far as he goes, and the rest he sloughs off onto the Solicitor General, and the Solicitor General passes the buck back to the Attorney General and nobody really knows what is going on.

When you are handling an investigation or a prosecution, you have to be in charge of the investigation as well as the prosecution. If you want something more done in the file that's been handed to you by the cops, you don't run to some other department, and talk the Solicitor General into giving you enough power to approach the investigator to get this done. It should be clearly understood at all times that you are in a position to get that done without all of that bureaucratese. This is a very important part of the administration of justice because this is where you can provide a whole lot of guidance to the police on what you expect from them in this case and also in future cases. If you can talk to them about it - "This is not the way to take a statement. This is not the way to arrest a person. This is not the way to search. And here is what you do" - you've got them on their way for the next case. If you have to go through the Solicitor General's Department you usually give up because you haven't time and it's not worthwhile.

That sort of a separation to me is entirely inconsistent with accountability which gets us right to the post of the Director of Public Prosecutions. It sounds good on paper. He's independent, he has no political implications. In other words, he has no accountability to the public. The public can never comment to him about his calls. They can't vote against him. They can't throw him out. He's going to be there until he's 75, because there's nothing you can do about it. Now, if he happens to be or turns into a bit of a kook, you are stuck with him until he is 75. If this fellow is put in there just for ten years instead of until he's 75, first of all, you have to ask how did he get the appointment without a whole lot of political pull? Second, if he's

there for ten years, he's going to want another career when he gets out. That means he is going to do ten years of personal politicking, just because he's human, and just because he needs to. Is that accountable to the public? Is that what you want, or do you want some accountability where the public can rule itself and says this kind of administration of justice is unacceptable? I am a believer in the old John Diefenbaker saying that there's not all that much prejudice, etc. in this world. He said, "If stupidity is capable of explaining a situation, you usually need to look no further for any explanation." Just bad, dumb calls. It's not usually dishonest.

I want to touch on one very practical, everyday point that I think a lot of people don't realize. To put it in a bold, attention-getting form, police, not prosecutors, run most prosecutions. That's the perspective of a very old prosecutor who has served a half a dozen or more Attorneys General. And in most cases if you go to the prosecutor and tell him this, he'll sneer at you and say, "Well, I, of course, am totally in charge," and he may be. All I'm saying is that 95 percent aren't.

My recommendation to Crowns is to send home 25 percent of the witnesses the police bring in. Seventy-five percent of the chattels, which they call exhibits, are to be thrown out, and out of the 7000 pictures that they bring to you, you use exactly three. If you follow that advice twice and the accused gets acquitted, the Attorney General gets a report against you. It says, "We did all of the wonderful work in here, and the Crown failed to present all of this evidence. No wonder he was acquitted." Not too many young prosecutors can do that on a continuing basis and remain employed by that Attorney General, so they go with the flow. It's all pensionable service and, anyway, they see people around them using the number one law which is to protect yourself.

So there's no real incentive to show some integrity. Unless we get people of integrity in the role of the Attorney General and let them know we expect that sort of behaviour, so they let their staff know that this is what they are supposed to do, then we're going to faction this off into 17 different little departments, and we're going to go by due process, and we're going to have the public not really respecting us. I keep hearing people say, "Hey, why don't you lawyers get together and get us another Bill of Rights, a Bill of Rights for law-abiding citizens." That's the kind of respect we're not getting now, and I think we'd better work on that.

[The Chair then invited comments from Prof. Philip Stenning and Prof. Michael Jackson.]

Professor Philip Stenning

As someone who has been commissioned by the Marshall Commission to do research for them, I've had probably as much opportunity as I deserve to have my views expressed to the Commission in a number of different forums, and I don't propose today to repeat the positions that I have taken before them. What I want to do is to make one simple comment about the presentations which have been made today.

As you know, I am opposed to the notion of an independent Director of Public Prosecutions, and to the idea that the prosecutorial process can, in some magic way, be de-politicized in the way which advocates of that kind of independent office have suggested. But if we accept this as the reality of what's going to happen, and I strongly suspect that it is, then it seems to me that what the Commission has to do is somehow get beyond the rhetoric of integrity and fairness and intervention only in exceptional cases and tell us more clearly exactly what kind of cases would be appropriate for an Attorney General to intervene in, and exactly what the limits of such independence for such an office would be.

Here I have great difficulty, because I don't think it's possible in advance to specify what kind of cases are the appropriate ones to intervene in. I think each case has its own special circumstances and that's why I believe that the most appropriate person to make that decision is a person who is in a political position. I believe that these hard cases are political cases. Assuming that they are to be dealt with by an independent official, then I think we need to know when it will and when it will not be appropriate for an Attorney General to exercise his residual, exceptional authority to intervene. I think the Commission should address itself quite specifically to those issues.

The other point I want to make is that I have great difficulty in seeing what difference any of the changes proposed today would have made to any of the three major cases that this Commission has been looking into so carefully during its hearings and other deliberations. It's not clear to me at all that, had Nova Scotia had an independent Director of Public Prosecutions, Donald Marshall would have been treated any differently in the justice system in Nova Scotia than he was. It's not clear to me that either Mr. Thornhill or Mr. MacLean or any of the others that have been discussed would have been treated any differently. I think it's incumbent upon the Commissioners, if they're going to adopt what I would call these somewhat idealistic solutions at the top of the pyramid to explain carefully and convincingly how these changes are going to address the fundamental problems down at the bottom of the system which I see as being revealed by the kinds of cases that they've been looking into.

Professor Michael Jackson

Some matters have come up in the last couple of days which have given me some cause for concern in terms of whether we are at that threshold I talked about for real change.

Some of you may be aware that a few years ago the Supreme Court of Canada rendered a decision which, in Mr. Manning's words "related to one of the great legal issues". The question was whether a document signed in 1752, the Treaty between the Micmac nation and the Crown was, in fact, a treaty under Canadian law. The case went to the Supreme Court of Canada, and the Supreme Court of Canada, after very extensive argument, ruled in an unanimous decision that that treaty was a treaty in law and that under the terms of the *Indian Act*, Indian people, acting pursuant to their hunting rights guaranteed by that treaty, were not subject to provincial wildlife legislation in Nova Scotia.

I teach a course in Native rights, and that case is celebrated and is cited in law schools across this country. It was recently cited before the Supreme Court of Canada in another case about aboriginal and treaty rights. The Court, in the course of its judgment, very clearly enunciated certain fundamental principles that treaties were to be interpreted in the broad and liberal way in accordance with the understanding the Indians would have given to the terms, and the ambiguities were to be interpreted in favour of the Indians.

The Supreme Court has enunciated those as the appropriate canons of interpretation to constitutional rights. It was with some alarm, therefore, that I learned that in Nova Scotia Micmac Indians continue to be prosecuted under the *Lands and Forests Act* on the basis that the treaty decision in the case of *Simon* really was limited to its particular facts and enunciated no general principles of law.

There may well be important issues of the interpretation of the *Simon* case. There may be genuine issues relating to the scope of that treaty. One of the questions I would like to raise is that in any other context in relation to the resolution of an important constitutional issue affecting the fundamental rights of a group of people who have special constitutional status, the provincial government would negotiate if there were unresolved ambiguities. If it was another province which had won a case vis-à-vis Nova Scotia, and the government of Nova Scotia was concerned about that, it would seek to negotiate. If negotiations failed, the government would, as it has done in other situations, make a reference to the civil courts.

In this case, Nova Scotia, on the assumption that it may have legitimate concerns about the *Simon* case, has chosen to invoke the most intrusive process, the criminal process, the process which in terms of the balancing of resources gives the state the pre-eminent role. It seems to me that what we have here, using Esmeralda Thornhill's definition of racism, is discrimination with empowerment

so that discrimination is fueled by the power of the state. I am drawn reluctantly to the conclusion that to the extent that the Attorney General's office has chosen to prosecute the Micmac because it disagrees with the *Simon* case is, in fact, an example of racism.

It seems to me that the Province of Nova Scotia, in taking the view it has of the *Simon* case as being a decision which speaks only to one individual is, in fact, undermining the rule of law.

It's with some diffidence I've risen to make this point, but it seems to me that in the context of this Commission which has given such a powerful focus on the question of how the Attorney General ought to be exercising his or her powers, I think the continued prosecution of the Micmac should be a cause of concern for all of us as to whether, in fact, change is about to happen in Nova Scotia.

Morris Manning,Q.C.

Your comments are most appropriate, in my view, because they raise another example of an area where the Commission can look in order to determine whether the Attorney General, as a courtroom advocate, should be independent from his cabinet colleagues.

I've recently come into this area in the last year and a half by reason of being retained on an Indian land claim, and was struck in my research of the material to note the difference between the way in which the Supreme Court of Canada and other provincial appellate courts have dealt with Indian land claims across the country as distinct from the way in which the American Supreme Court has dealt with similar claims.

It struck me that one of the reasons for the different approaches is obviously the position taken by counsel for the Crown. Where there are prosecutions under provincial statutes for breach of provincial laws and the defence is raised that this is not a breach of the law because there's an overriding constitutional law or value or a treaty which make this not a crime, we find that the role of the Attorney General changes into a political, as well as an advocacy role. Your comments are most apposite because they demonstrate that in those prosecutions, as well as in the civil claims themselves, it is of the utmost importance that this feeling of racism or discrimination not be there. When counsel for the Crown stands up to speak, counsel represents the greater public interest, not the individual interest or the group of individuals. And when that counsel speaks, that counsel should be of assistance to the court to see that justice is done and that the interpretation that's placed on the law is one that is coming from an independent perspective and not one that has, as its root, political expediency.

Those cases highlight the necessity for complete independence in order to be free of this concept of racism or discrimination, both in

theory or in practice, and as well, to be of greater assistance to the court.

Serge Kujawa, Q.C.

Assuming that Professor Jackson is correct that the Attorney General is wrong in law and/or is prejudiced, there will be an election before long, and he can be voted out and a great improvement put in his place. But let's say you have a Director of Public Prosecutions who could be equally wrong on those things. He's going to be there until he's 75 years of age. Which do you want? Where is the accountability? That's the issue.

Professor Brian Slattery

My name is Brian Slattery and I teach at Osgoode Hall Law School in Toronto. Professor Edwards said that the Attorney General - and, indeed, one might say other members of the government - has not only the power but the constitutional responsibility to uphold the Constitution and, in particular, the Charter of Rights and Freedoms.

But, of course, there are constitutional duties which go beyond the Charter of Rights and Freedoms, some of which, are embodied now in Section 35 of the *Constitution Act, 1982*. Section 35, as we all know, states that the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. The point that I want to make is that it is commonly thought that that section is addressed exclusively to the courts. If the Native people - Metis, Inuit, Indian people - feel that their aboriginal and treaty rights have been violated, well, they can go to court. Or if they are brought to court, they can raise Section 35 as a defence. Of course, they may and they do. But that is only to see one very small part of what ought to be the proper function of Section 35. It's as if we thought that when the 1867 Act was passed setting up the federal government and provincial governments, that one had to go to court in order to get a federal government set up. Well, that's simply ridiculous. Of course, we know that federal government was just set up. It was set up by those people who had the constitutional responsibility to do it.

That's making the point in a more general and obvious context, but I think it holds true also in this context that there has been virtually nothing done on the governmental side and by the Attorney General to figure out, in effect, what are the aboriginal and treaty rights of the people of their province and to act accordingly. I would have thought that one of the first major steps in that process is to consult with the people in question. What, in their view, are their aboriginal and treaty rights. This is not something that should be left to the courts alone.

It's too big a task. It's a task beyond the court. In the context of prosecutorial discretion, it is the constitutional responsibility of the Attorney General not to prosecute when there are genuine aboriginal and treaty rights. I don't think that any effort of that kind has been made.

I would also like to make the point that that unwillingness to act is not necessarily, in itself, racism. In fact, it's something deeper and more difficult to eradicate than racism. Racism is a definite act directed against an identified group. This is non-recognition. It is unwillingness to act because of total non-recognition of anything special about Native people. How do you fight against non-recognition and inaction. A very difficult problem, indeed.

Closing Comments

Chief Justice Hickman

On Thursday morning when I opened this Consultative Conference, I expressed the hope that there would be frank and uninhibited dialogue between those in attendance. Now, at the end of two and a half days of splendid discussion I am able to say, without reservation, that the Royal Commission's hopes and aspirations in that regard have been realized. We are, indeed, grateful.

It was decided by the Commission at an early stage of our deliberations that it would be of enormous benefit to us if we could devise a Conference which would bring together people with particular expertise and experience in the criminal justice system who possessed a passionate belief in their cause. This Consultative Conference which was formulated to meet that objective has more than adequately discharged that mandate.

We knew it would be virtually impossible to elicit the real concerns and experiences of Natives and Blacks with the criminal justice system simply by calling witnesses to appear before formalized public hearings to give *viva voce* evidence in such a restrained atmosphere. We wanted knowledgeable persons to have the public opportunity to raise their concerns in a manner which would arouse the conscience of the citizens of Nova Scotia and beyond, while at the same time providing the Commission with practical recommendations based on experience and research. We have not been disappointed.

Those Canadians from all areas of this nation as well as people from outside Canada who have, without any remuneration or fee, come to Halifax and allowed us the benefit of their expert and professional advice have rendered outstanding service to the Province of Nova Scotia. For that, we Commissioners thank you most sincerely.

On Thursday, led by outstanding panelists, supported by enthusiastic workshop participants, we were given graphic and well-researched descriptions and examples of the concern of Native people with the criminal justice system which has been imposed upon them by the dominant society. Their realistic recommendations, based in part on centuries of caring traditions, will give us valuable insight when wrestling with the vexing problems as we work on the Commission Report.

Yesterday, highly articulate and extremely intelligent Blacks shared with us their understandable frustrations with the criminal justice system which daily intrudes upon their private lives without, in their view, providing equal treatment under the law. Again, their meaningful recommendations and pleas for justice will be carefully and sympathetically reviewed by all Commissioners as we try to shape realistic recommendations.

Today, we've had the good fortune to hear submissions from Canadians with years of experience in the area of prosecutorial decision-making by Attorneys General. And I'm certain I speak for both my fellow Commissioners when I say their expert opinions will be extremely helpful.

The ultimate responsibility for law enforcement rests with Her Majesty's Attorney General who must perform his or her awesome duties without fear, favour or affection. It follows, therefore, that the independence of that office must not only be enhanced and strengthened, but must be so structured that all Canadians will perceive it as an institution of total independence from outside influences and the guardians of their rights and liberties under the rule of law.

On behalf of the Royal Commission, I thank all who have participated in this public Consultative Conference. I'm sure you will all agree, we were fortunate, indeed, to have Mr. Thomas R. Berger chair all our public sessions. His leadership has been outstanding. His experience in dealing with legitimate concerns of minority groups and his involvement in several important Royal Commissions eminently qualified him to lead and guide our deliberations. This he has done and I extend to you, Mr. Berger, the sincere thanks of the Royal Commission for your splendid, splendid help.

All members of the Commission are extremely grateful to our staff for their efforts in organizing this event. It has been efficiently managed, and I thank all who are so involved.

I thank the press for the knowledgeable coverage that they have given our public hearings during the past year or more and the coverage they have given this Conference. It was deemed essential by the Commission that a public awareness of the problems in the criminal justice system be graphically brought into focus by the

wrongful conviction of Donald Marshall, Jr. In regard to that and in pursuit of that objective, the press, in my view, has played a meaningful role during the past year and a half, and I thank them for it.

Once again, I thank all of you for participating and attending this Consultative Conference which I now declare to be at an end.

Thank you so much.